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"INTERNATIONAL LAW ODYSSEY 2001: BEYOND THE LIMITS"

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PANEL ON THE RESPONSES TO THE RECENT TERRORIST ATTACKS ON THE U.S.

*Anne F. Bayefsky**

The war on terrorism has a fundamental flaw, which puts its success directly at risk. It is the unwillingness to espouse publicly, a definition of terrorism, and hence to separate morally, politically and legally, terrorists from non-terrorists. It is not possible to win this war unless we recognize the enemy, are prepared to define a terrorist, and follow that lead wherever it goes, without discrimination.

Over the past two months the path has been impeded by smokescreens and subterfuge. Two months—because the current rhetorical battle took off from Durban, South Africa at the United Nations World Conference Against Racism, which ended just three days before the bombing of the World Trade Center. Durban was a conference in which Syrian and Pakistani diplomats took a leading role, with the vocal support in particular of the Palestinian delegation, Iran, Egypt, and the United Arab Emirates. They hijacked the agenda, isolated Israel, and forced the United States delegation to walk out. But in so doing, they also clarified their intentions.

In Durban, delegates remaining after the US and Israeli departure, discussed in public sessions whether the Holocaust had a capital “H” or an “s” on the end. Iran objected to the imbalance and favoritism which would result from adding a reference to Holocaust. The United Arab Emirates thought references to the Holocaust detracted from the accurate representation of historical events. In the end the global declaration against racism deleted all references to the Holocaust but one, which reminded us of its occurrence.

Durban delegates discussed the meaning of anti-Semitism and whether it was appropriate to include it in a final anti-racism agenda. Syria called it a “curious and bizarre concept.” Pakistan called it “a difficult area.” All references to anti-Semitism in paragraphs relating to political parties, legal and judicial cooperation, education and training, were eventually removed. Only two references were ultimately permitted, as equivalent to “Anti-Arabism” or “Islamophobia.”

* Visiting Professor, Columbia University School of Law. These remarks were presented at the International Law Association ILA Weekend, October 2001, New York, New York, United States.

The political assault on Israel in Durban began with "Zionism is racism," and metastasized into Israel as an apartheid state. Both were specifically approved by the NGO Forum, in which the words of Palestinian Hanan Ashrawi drew parallels between Israelis and Nazis. In the government conference, Egypt complained that occupation "implants people who are of a different religion and that breeds racism," "Judaization" in United Nations Human Rights Commission lingo. Since separation from Palestinians was "apartheid," intermingling of Moslem and Jew was evidently acceptable as long as it was not on Arab soil. In the end, the Durban Declaration declared a new "right to return to their homes" designed to terminate the Jewishness of Israel, and placed the "plight of the Palestinian people under foreign occupation" into a global commitment to fight racism.

On September the 8th, therefore, the political strategy was clear. One and the same states sought to minimise or exclude references to the Holocaust, and redefine or ignore anti-Semitism, as sought to isolate the state of Israel from the global community as a racist practitioner of apartheid and crimes against humanity. The vestiges of Jewish victimhood were to be systematically removed by deleting the references to anti-Semitism and the Holocaust. They were to be displaced by the Palestinian victim living under racist, Nazi-like, oppression. Success on the political battlefield was to be accomplished by utilizing the language of human rights to demonize, and then dismember, the opponent. In sum, every "anti-Semitism" was matched with "anti-Arabism." Every objection to singling out Israel was met with cries of "Islamophobia." Every Jewish tragedy was met with Palestinian grievance.

Post September 11th, the strategy of Arab states and many Moslems in and outside the United States, is exactly the same. From Jordan's King, Egypt's President, Iran's Ayatollah Khamenei, and Saudi Arabia's Prince Bandar, comes: combating terrorism means looking for root causes. American support for Israel is at fault. Dozens of Islamic leaders in the Arab world tell us that a war against terrorism is a racist response against Islam. From the purveyors of hate on the Internet, the Jews in the World Trade Center all escaped, and Palestinian celebrations were media concoctions. According to demonstrators in many Arab states, the true victim is the Palestinian, not the dead beneath the rubble. From France's Ambassador to Israel and Palestinians themselves, Jewish children in pizza parlours or teenagers in Tel Aviv discotheques are different. In sum, the goal is to eclipse the dead in New York, Pennsylvania and Washington by the victims of anti-Arabism in the United States and elsewhere. A war against terrorism is Islamophobia. The root causes of terrorism reveal the true victim to be the Palestinian.

The United Nations continues to serve as a staging ground for this inversion of terrorist and victim. In the recent General Assembly debate on terrorism, Libya, on behalf of the Arab Group, said: "[R]esistance to occupation is one of the most important obligations, not only legitimate rights, for people whose lands are occupied by the foreigners. ... Occupation must be on the top of the terrorists acts that the world should decide to confront and eliminate." Many Arab delegations, including the Iranian and Saudis, denounced an alleged new wave of Islamophobia and bigotry against Muslims and Arabs, called for the international community to "address terrorism at its roots," and objected to criticism of "resistance to foreign occupation and state terrorism."

The insistence by Arab states on differentiating between violence directed at Israelis and all other forms of terrorism, and exempting violence in the name of self-determination or against foreign occupation, is also scheduled to come to a head shortly in the General Assembly's Sixth Committee. The definition of terrorism will be a determinative factor in the adoption of a comprehensive convention on international terrorism. At the same time, the election of Syria to the Security Council means a state sponsor of terrorism will now be a major player in the operation of the Committee of the Whole charged with implementing Security Council directives to combat terrorism.

In this environment, refusing to define a terrorist is no longer an option for the Administration. The failure to clearly state that Israelis are the victims of terrorism, and vocally support their entitlement to self-defence, will blow apart the existing coalition just as surely as the deafening silence.

Some thought the President could have it both ways. Moslem participation in the fight against terrorism on the one hand, and rewards for Arafat in the form of promises of statehood and pressure on Israel to negotiate in the face of violence, on the other. To many, the two tracks seemed eminently complimentary. Keep Moslem states inside by keeping Israel on the outside.

The plan, as could have been anticipated, is disintegrating as we speak. Moslem states will not be satisfied with what has been offered so far, since what they seek is the total isolation of Israel. Israel cannot afford to be marginalized in a war against the very terrorism that threatens to destroy it. The rest of us risk losing our way in the absence of a coherent purpose. State sponsors of terrorism or foreign terrorist organizations are not reliable allies in a fight against terrorism, whatever their religion. The victims of terrorism will not be silenced, just as they are also not defined by race, religion or nationality.

At bottom, Americans continue to underestimate the sense of vulnerability in Israel and the gravity of the threat. It is a threat felt by five million Jews in a region of over 100 million people in surrounding hostile states, living in 28,000 square kilometers or 0.2% of the land occupied by the Arab world. At the same time, the assassination of a cabinet Minister in any democracy is impossible to ignore. Such facts make an Israeli Prime Minister, regardless of political party, unable to stand by.

The essential rules which govern a war on terrorism are those of proportionality. Those who would instead define ally or foe alike by religion—be they Moslem or Jew—will doom the current campaign to failure and ultimately irrelevance, as the passions of racism triumphant in Durban will take over.

TRANSNATIONAL ACCOUNTABILITY AND THE POLITICS OF SHAME

*James N. Rosenau**

Since my work on world affairs is sensitive to the legal dimensions of the course of events, it is an especial pleasure to participate for the first time in a meeting of the International Law Association. But I must note at the outset that I am somewhat illiterate in the both the practice and study of international law. My sensitivity to the relevance of the legal context that infuses any international situation has never superseded my preoccupation with other dimensions of such situations. Hence my illiteracy stems from always locating questions of law in more encompassing political, social, and economic contexts. Such is the case with this panel. The questions we shall address are essentially political questions, or at least my comments on them will perforce focus on other than their legal aspects.

Indeed, my main message largely involves epistemology and methodology, the need to be clear what we mean by certain terms and to approach their implications in a cautious and nuanced way. With the world undergoing powerful challenges marked by huge uncertainties, pervasive contradictions, and endless ambiguities, it is not easy to trace nuance. It is easier to yield to the temptation to come up with clear-cut and simple solutions rather than to extend ourselves to avoid falling into a wide rage of definitional and epistemological traps.

Perhaps the most dangerous trap involves what I call the "domestic analogy": The tendency to think about the problem of accountability at the international level as if we had domestic processes in mind. Even if one accepts that a sharp distinction can be drawn between the domestic and international worlds—as I do not—the procedures that allow for accountability in domestic systems cannot be developed in an international context. Or at least the practice of holding elected officials and administrations responsible for what happens on their watch cannot be duplicated in international settings. The reasons are numerous. International organizations are run by states that are not accountable to

* Professor of Law, George Washington University. This paper was prepared for the Opening Panel of the Annual Meeting of the American Branch of the International Law Association, New York, New York, October 25, 2001.

1. See JAMES N. ROSENAU, *ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD* (1997).

their domestic publics for how they vote because such votes are not politically salient. NGOs and transnational advocacy groups are not accountable to their memberships in any meaningful way. In some their leaders may be elected by their memberships, but this form of accountability is rare and it is ineffective in those rare cases when it is operative. Corporations are accountable to their stockholders, but they usually manage to prevent dissident stockholders from having any consequence. In short, elections in which individual citizens or members have any say in what transnational collectivities do or plan are either nonexistent or superficial. Accordingly, it is far-fetched to ponder how accountability can be achieved through the domestic methods that allow for the ouster of old leaderships and the election of new ones. The traditional definition of democratic practice simply does not apply in the case of transnational and international collectivities.

Does this mean that transnational accountability cannot be achieved? No, it does not if one can break free of the stranglehold that the domestic analogy has on our thinking. There are mechanisms for maximizing rather than minimizing accountability beyond domestic boundaries. They may not be adequate from a domestic perspective, but they can be more rather than less effective if different criteria of effectiveness are employed.

A second mistake to avoid is that of focusing on radical rather than practical changes. There is no reason to believe that proposals to replace the IMF and World Bank, or to enlarge the membership of the UN Security Council, or to create a third house of the United Nations that represents civil society—to mention just some of the radical proposals that have been bandied about—can ever be realized. To borrow a social science concept, the course of global affairs, like that of any large organization or society, is too path dependent, too habituated to set ways of getting from one day to the next, to undertake radical changes of course. As noted below, however, there is a host of less encompassing and more practical steps that can be taken to enhance the transparency and responsiveness of the prevailing international architecture.

A third trap to avoid is that of aspiring to one instrument of accountability suitable to all situations. The world is too diverse, its dependent pathways too numerous and too pervaded with contradictions, for any single mechanism to be sufficient.

But, despite the diversity, and notwithstanding the deeply entrenched pathways in which the course of events are ensconced, there are mechanisms for enhancing the accountability of the present international architecture. Some of these are linked to the continuing disaggregation of world affairs. My view of the current scene is one in which traditional centers of authority are breaking down and new ones proliferating, with

the result that the global stage is ever more dense with both governmental and nongovernmental collectivities that enjoy sufficient legitimacy with their followers to act on their behalf.² More than that, the advent of the Internet and other micro-electronic technologies have facilitated extensive networking among NGOs. There is strength and accountability in the complexity of this surfeit of ever-proliferating transnational actors and their networks. Their growing numbers make it increasingly difficult for any one actor, or any coalition of actors, to act imperiously and without being held to account. To be sure, the density of the global stage renders the chances of wide consensus's in response to the challenges of our time highly problematic. But muddling through in the absence of broad consensus's is not a bad price to pay for greater accountability.

Put differently, the pathways on which the world is dependent have undergone a major bifurcation. There are now two worlds of world politics: the state-centric world that has presided over global structures for centuries and what I call the multi-centric world, which encompasses the wide range of new actors that have clambered onto the global stage and that have the authority to challenge, cooperate, or otherwise interact with the state-centric world and its institutions. Some analysts refer to the state-centric world's new rival as civil society, but I prefer to view it as a multi-centric world in order to allow for a diversity that includes corporations, professional societies, and other entities as well as the advocacy groups that are usually viewed as the core of civil society. Indeed, using the letter "n" to represent any number, one can say that the emergent structure of bifurcation is best labeled as an "nfurcation" of world politics.

But this is not to downplay the relevance of advocacy groups. The boisterous politics of shame they practice through their recurrent protests against international financial institutions (IFIs) is not without consequence. They have succeeded in elevating the rich-poor gap and the pervasiveness of poverty to a perch high on the global agenda. There is more than a little evidence that their messages are being heard in corporate boardrooms and the halls of governments. It is not far-fetched to anticipate that the accountability and transparency of IFIs will be considerably expanded in the coming years through the publication of their board minutes, country-assistance strategies, letters of intent, internal evaluations, and other documentary evidence of their decisions and actions. Conceivably, too, the politics of shame will contribute to bargaining that results in more seats for developing countries on the IFI boards and the

2. The notion of proliferating authority centers is elaborated in JAMES N. ROSENAU, *DISTANT PROXIMITIES: DYNAMICS BEYOND GLOBALIZATION* (forthcoming Princeton Univ. Press).

establishment of think tanks to provide independent analyses and advice to the boards.

Needless to say, the politics of shame is not dependent on recourse to violent protests. On the contrary, the shaming messages get overridden and lost when protests turn violent.

Of course, there are other mechanisms besides that of publicity through shaming protests. Shame can take the form of publishing statistics such as the annual corruption index released by Transparency International (TI). Quiet pressures can also be effective. Rather than sponsor mass protests, for example, TI devotes most of its resources and energies to negotiating with the elites that preside over IFIs and other international institutions rather than mobilizing mass publics.³

If time permitted, one could list a number of other mechanisms for furthering accountability without reliance on the domestic analogy. Most of these involve working with international organizations and national governments to promote further disaggregation, thus bringing transnational decisions closer to the people and publics affected by them. And it is with respect to these mechanisms that the legal profession has a huge role to play inasmuch as treaties and public policies will have to be rewritten to achieve desirable levels of decentralization. But elaborating these mechanisms will take me beyond my allotted time. And having already indicated that my legal competencies are limited, that is just as well. For now it is enough to stress that while the storehouse of potentially effective accountability mechanisms may not be overflowing, it is full.⁴ And there is no dearth of able individuals and organizations, including my colleagues on the panel and in the audience, committed to enumerating, analyzing, and implementing them.

3. Cf. Hongying Wang and James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 *GLOBAL GOVERNANCE* 25 (Jan. 2001).

4. See, e.g., Report on the 2020 Global Architecture Conference, Centre for Global Studies at the University of Victoria (Aug. 29-31, 2001).

INTERNATIONAL POLICE FORCE OR TOOL FOR HARASSMENT OF HUMAN RIGHTS DEFENDERS AND POLITICAL ADVERSARIES: INTERPOL'S RIFT WITH THE HUMAN RIGHTS COMMUNITY

*Charles R. Both**

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I. INTERPOL MISUSE—A CASE STUDY: KAZAKHSTAN

A. *De jure*

The limits imposed on member states are explicitly set forth in Article III of the ICPO-Interpol Constitution and General Regulations. Thus, it is strictly forbidden for the organization to undertake any intervention or activities of a political, military, religious, or racial character. According to the interpretation given to Article III, a political offense is one that is considered to be of a predominantly political nature because of the surrounding circumstances and underlying motives, even if the offense itself is covered by ordinary criminal law in the country in which it is committed. This interpretation, based on the *predominant* aspects of the offense, was first mentioned in a resolution adopted by the Interpol General Assembly in 1951. A resolution adopted in 1984 states that, in

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general, offenses are not considered to be political when they are committed outside a "conflict area," and when the victims are not connected with the aims or objectives pursued by the offenders.

B. De facto

The principles seem sound, but how do they work in reality? What if a member state abuses Article III and seeks to use the organization in pursuit of its own authoritarian objectives? What if that member state repeatedly invokes Interpol's apparatus but fails to carry forward its obligation to obtain extradition of the detainee? That is precisely the case that we describe here in relation to the actions of the repressive Nazarbayev regime in Kazakhstan during 1999 and 2000, as it sought to interfere and disrupt the political opposition and criminalize the activities of the leading opposition figure, former Prime Minister Akezhan Kazhegeldin.

II. BACKGROUND

In early October 1998, Kazhegeldin participated in an organizational meeting of the "Movement for Free Elections" in anticipation of presidential elections to be scheduled in Kazakhstan. Kazhegeldin had emerged as the most viable opposition candidate to challenge incumbent president Nazarbayev, the holdover president from the Soviet era.

Kazhegeldin was charged with an administrative violation for participation in the activities of an "unregistered organization." He was convicted while away from the country, *i.e.*, *in absentia*, and subsequently "disqualified" as a result of that conviction from becoming a candidate for the office of president. Prior to his "disqualification," but in an effort to discredit and intimidate him, Kazhegeldin was accused of income tax evasion, abuse of office (bribe taking), illegal ownership of property outside of the country (specifically real estate in Belgium), and other economic crimes. Each accusation was rebutted and disproved by Kazhegeldin with specific evidence, and at considerable expense. The international community, including OSCE, the United States Department of State, and numerous human rights organizations, uniformly criticized the eventual "reelection" of President Nazarbayev.

Following the elections, Kazhegeldin continued his efforts to reform the political and economic conditions in Kazakhstan by supporting efforts to create an independent media, establishing an opposition political party (Republican Peoples Party of Kazakhstan "RPPK"), and criticizing the Nazarbayev regime outside of the country before various governmental forums.

III. DETENTION IN MOSCOW—SEPTEMBER 1999

In May 1999, Kazhegeldin testified before the United States Congress concerning conditions in Kazakhstan and was particularly critical of the Nazarbayev regime. Shortly after his hearing before Congress, the Kazakh authorities “reopened” the “tax investigation” that had been previously closed upon a determination that all taxes had been paid and no criminal activity had occurred in connection with the payments.

In early summer 1999, the Kazakhstan Security Police (“KNB”), the successor to the KGB, requested Interpol to issue a Red Alert for the arrest and extradition of Kazhegeldin. The purported reasons for his detainment were the 1997 tax charge against Kazhegeldin and the allegations of misconduct with respect to property he allegedly owned in Belgium.¹

While traveling to Russia to meet with political activists and members of the RPPK who were organizing for Parliamentary Elections in Kazakhstan, Kazhegeldin was temporarily detained by Russian police authorities on the basis of the Interpol Red Alert. When the General Prosecutor of Kazakhstan was unable to provide sufficient evidence to support an arrest or extradition, Kazhegeldin was released. According to the contemporaneous press accounts, the Russian General Prosecutors Office studied the charges brought against Kazhegeldin and came to the conclusion that the detention was not substantiated. By this action, however, he was prevented from meeting with his political supporters and from exercising rights guaranteed to him under the United Nations Universal Declaration on Human Rights.

IV. DETENTION IN ROME—JULY 2000

Again, in July 2000, while he traveling to Rome to pursue political activities directed at advancing democracy and a free press in Kazakhstan, Kazhegeldin was detained by Italian authorities on the basis of an Interpol

1. These are the same allegations that first arose during Kazhegeldin's effort to run for president in 1998. In May 1999, Professor A. I. Khudyakov, a leading authority on Kazakh Tax Law, who was directly involved in drafting the law, rendered an unqualified legal opinion that “the criminal proceedings [against Kazhegeldin] were initiated without sufficient grounds.” All of the relevant facts concerning the handling of Kazhegeldin's receipt of income and payment of his taxes, albeit late, of his taxes made clear that the requisite intent to avoid payment was absent. Indeed, on October 16, 1998, the Almaty Tax Committee confirmed that Kazhegeldin had not engaged in any criminal activity with respect to the payment of his taxes. Likewise, the persistent allegations concerning the ownership of property in Belgium were repeatedly disproved, first by submission of certified land records showing the absence of any ownership of property by Kazhegeldin and, ultimately, by securing a Court decision in the Dutch Court establishing that Kazhegeldin never owned the property or corporation that the Kazakh authorities alleged he did. Ironically, Nazarbayev's close political advisor and business partner owned the property in Belgium.

alert issued at the request of Kazakhstan KNB. The request was based on the same previously rejected allegations and a "new," equally frivolous, allegation that Kazhegeldin was engaged in "terrorism." Again, the Kazakhstan General Prosecutor was not able to justify the arrest and extradition of Kazhegeldin. The Justice Ministry announced that the Rome Appeals Court had ordered Kazhegeldin's release from preventative detention after concluding that there were no grounds to detain him.

V. AN UNCONSTITUTIONAL AND INTERNATIONALLY REPUGNANT TRIAL *IN ABSENTIA*

In March 2001, Nazarbayev signed a most pernicious law permitting the trial and conviction of Kazakh citizens "*in absentia*." This new law is regionally known as the "Kazhegeldin Amendments" and has been employed to obtain a conviction "*in absentia*" of former Prime Minister Kazhegeldin of the very same charges that have been leveled against him since 1998 when he challenged Nazarbayev for the presidency.² The conviction was assailed as particularly unfair by the OSCE whose representatives in Kazakhstan personally observed the "trial." The conviction was also the subject of a formal demarch issued by the United States Department of State. The Nazarbayev regime, yet again, has used this false "conviction" as the basis for requesting that Interpol use its apparatus to detain Kazhegeldin as an enemy of the state. The obvious objective of the request is to stifle dissent and to interfere with the political rights of the Kazakhstan opposition.

VI. A SOLUTION

The adage that "every dog is entitled to one bite" seems apt. Here, the authoritarian Nazarbayev regime has now demonstrably had "two" bites. No matter how vicious or rabid its attempts have proven to be, on both occasions it has been unprepared to present justification or credible basis for the obvious interference with protected political activities of the opposition within the country. Having twice acted in direct contravention of Article III's prohibitions against use of the organization to interfere with "predominantly political" activities, Kazakhstan police authorities should

2. Recognizing that it had on at least two prior occasions failed to convince a legitimate and objective "trier of fact" (e.g., Russian and Italian authorities, among others) that the charges were justified or credible, the Nazarbayev regime now tried Kazhegeldin not for taking bribes, but rather for soliciting them. Of course, those who testified against him and claimed to have made the bribes were close supporters of the regime, in fear of the own status in the country, or persons with motives to fabricate the charges. The court sitting in judgment of Kazhegeldin was comprised of a single Supreme Court judge who had been personally appointed by Nazarbayev and was related to him. His judgment is not appealable.

not be permitted to use the organization's apparatus. Kazakhstan should first establish, in a competent and credible forum, that the request is not a further violation of Interpol's constitution and regulations. In these circumstances Interpol, or some judicial authority outside of the member state, should make an initial determination that the request is legitimate. The burden should then shift to the member state seeking use of the organizations apparatus to explain, justify, and establish credible basis for a detention.

THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE HUMAN RIGHTS VIOLATIONS

*Elizabeth Defeis**

The Foreign Sovereign Immunities Act (FSIA) was enacted in 1976 and provides the sole basis for obtaining jurisdiction over a foreign state in the federal courts.¹

Until 1952 the United States, as a matter of grace and comity, granted foreign sovereigns "virtually absolute immunity" from the suit in the courts of this country.² The judicial branch consistently deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.

In the first half of the twentieth century, as the commercial and trading activities increased, the "restrictive" theory of sovereign immunity gained international acceptance. Under this approach, immunity is confined to the sovereign or public acts of the foreign state and does not extend to its commercial or private acts. The Department of State, through its famous Tate Letter³, embraced the restrictive theory of immunity in 1952. Thereafter, the State Department continued to advise courts on a case-by-case basis to determine whether to extend immunity. If in a particular case no advice was forthcoming, then the courts would independently determine whether immunity was appropriate. By enacting the FSIA in 1976, Congress substantially codified the restrictive theory of

* Professor of Law, Seton Hall University School of Law. The professor would like to thank her research assistant, Cemile Angun, Class of 2003. These remarks were presented at the International Law Association ILA Weekend, October 2001, New York, New York, United States.

1. *Amerada Hess Shipping Corp. v. Argentina Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986) *rev'd*, 830 F.2d 421 (2d. Cir. 1987) *cert. granted*, 485 U.S. 1005 (1988) *rev'd* 488 U.S. 428 (1989).

2. *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812). Later, the notion of Comity was defined as "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

3. Letter from Jack B. Tate, Acting Legal Advisor, Dep't. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), in 26 DEPT. ST. BULL., Jan. 7, 1952, at 984-85.

sovereign immunity.⁴ FSIA effectively transferred the determination of the immunity question from the Executive Branch to the Judicial Branch.

The Foreign Sovereign Immunities Act of 1976 provides that foreign sovereigns are immune from the jurisdiction of the United States courts except under limited stated circumstances.⁵ In order to bring a suit against a foreign sovereign, the case has to be brought within one of the exceptions enumerated in the Act.⁶ The relevant exceptions for the human rights analysis are:

1. Waiver of immunity by the foreign state either explicitly or by implication;⁷
2. Commercial activity exception in which the foreign state carries on commercial activity in the United States or the activity carried on outside of the United States territory that has direct effect on the United States;⁸

These comments will first discuss the efforts that have been made to address the human rights violations using the argument that a foreign government waives its immunity by engaging in actions that amount to a violation of *jus cogens* principles. It will then discuss the various amendments and proposed amendments to the FSIA that would allow suites to be brought for human rights abuses.

In discussing the waiver of immunity argument for human rights abuses, one must start with the case of *Argentine Republic v. Amerada Hess Shipping Corp.*, decided by the United States Supreme Court in 1989. In that case, two Liberian corporations sued Argentine in the United States District Court to recover damages for a tort, allegedly committed by its armed forces on the high seas in violation of international law. The Plaintiffs alleged that the defendant's attack on the neutral ship violated international law and thus triggered the District Court's jurisdiction under the Alien Tort Statute (ATCA).⁹ The ATCA, enacted in 1982, provides

4. FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-11 (1976)).

5. 28 U.S.C. § 1604 reads: "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

6. *Amerada Hess Shipping Corp.*, 488 U.S. at 439.

7. 28 U.S.C § 1605(a)(1).

8. 28 U.S.C. § 1605(a)(2).

9. ALIEN TORT CLAIMS ACT OF 1982, 28 U.S.C. § 1350 (1982), was originally passed as a provision of JUDICIARY ACT OF 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789). The Act was not used widely by the courts until its revival by the Second Circuit in 1980 decision of *Filartiga v.*

that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁰ They also argued jurisdiction under the general admiralty and maritime jurisdiction, and the principle of universal jurisdiction.¹¹ The District Court dismissed the suit for lack of subject matter jurisdiction, ruling that the Plaintiffs’ suit was barred by the FSIA.¹² The Second Circuit reversed and held that a cause of action did exist under the Alien Tort Claim Statute. The Court reasoned since the bombing of an unarmed vessel on the high seas was a tort, and it was done in violation of an international law, the ATCA conferred jurisdiction on the United States Courts.¹³

The United States Supreme Court reversed, holding explicitly that the FSIA was the sole basis for obtaining jurisdiction over a foreign government in the courts of the United States. Even if the case involves a violation of an international law, the cause of action must fit within one of the exceptions of the FSIA in order for the Federal Courts to have jurisdiction.

The Plaintiffs in the *Amerada Hess* case argued that the international agreements entered into by United States and the Defendants were sufficient to create an exception to immunity under the FSIA.¹⁴ Their argument was based on the language of the Act which provided that the FSIA was adopted “subject to international agreements to which the United States was a party at the time of its enactment.”¹⁵ They then referred to the Geneva Convention on the High Seas and the Pan American Neutrality Convention as constituting an implied waiver of exception under § 1605(a)(1). However, the Court ruled that the international agreements would constitute a waiver only when they expressly conflict with the immunity provisions. It rejected the idea that a foreign nation could waive its immunity simply by “signing an agreement that makes no mention of waiver of immunity to suits in the United States or even the availability of a cause of action in the United States.”¹⁶

Pena-Irala, 630 F.2d 876 (2d. Cir. 1980), when it conferred jurisdiction against former Paraguayan police inspector general for the torture and death of Plaintiffs’ relatives.

10. 28 U.S.C. § 1350 (1982).

11. *Amerada Hess Shipping Corp.*, 488 U.S. at 428.

12. *Argentine Republic*, 638 F. Supp. at 77.

13. *Argentine Republic*, 830 F.2d at 426.

14. *Amerada Hess Shipping Corp.*, 488 U.S. at 442.

15. 28 U.S.C. § 1604.

16. *Amerada Hess Shipping Corp.*, 488 U.S. at 442.

In order to circumvent the unambiguous language of the *Amerada Hess* case to allow suits against the foreign governments for alleged human rights abuses, several creative arguments have been developed over the years. Some have been based upon a *jus cogens* exceptions to immunity. This argument was discussed in a creative 1989 law review article entitled *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*.¹⁷

In *Princz v. Federal Republic of Germany*,¹⁸ the *jus cogens* argument was urged. In that case, an American citizen who survived the Holocaust sued the Federal Republic of Germany to recover money damages for injuries he suffered, and slave labor he performed, while a prisoner in Nazi concentration camps. The United States District Court for the District of Columbia allowed subject matter jurisdiction over the survivor's claim. However, in an opinion written by Justice Ruth Bader Ginsberg, the D.C. Circuit reversed the lower court decision, rejecting Princz's claim that Germany waived its immunity by violating *jus cogens* norms.¹⁹ The Court focused on the intent requirement that is implicit in the FSIA and held that Germany did not display any intention of waiving its immunity by violating these principals.²⁰

This comment will discuss only that aspect of the case that pertains to the claim of implied waiver of immunity.

In *Princz*, the Plaintiff had argued that the Third Reich impliedly waived Germany's sovereign immunity under the FSIA by violating *jus cogens* norms of the law of nations. It was argued that "A foreign state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign."²¹

According to the Vienna Convention on the Law of Treaties, a *jus cogens* norm is a principle of international law that is "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."²² They prevail over and invalidate international agreements and

17. Adam C. Belsky, Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Preemptory Norms of International Law*, 77 CAL. L. REV. 365 (1989).

18. *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

19. *Federal Republic of Germany*, 26 F.3d at 1176.

20. *Id.* at 1174.

21. *Id.* at 1173.

22. The Vienna Convention on the Law of Treaties, opened for signature May 23, 1969 (entered into force Jan. 27, 1980) 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679, 699 (1969).

other rules of international law in conflict with them. According to the Restatement, a state violates *jus cogens*, if it "practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment of gross violations of internationally recognized human rights."²³ In *Princz*, Justice Ginsberg noted that the Nuremberg trials

for the first time made explicit and unambiguous what was theretofore, . . . implicit in International Law, namely, . . . and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime.²⁴

She noted further that "the universal and fundamental right of human being identified by Nuremberg—rights against genocide, enslavement, and other inhuman acts . . . are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*."²⁵ Justice Ginsburg acknowledged that it was doubtful that any state had ever violated *jus cogens* norms on a scale rivaling that of the Third Reich. Thus it was argued that interpreting the FSIA to imply a waiver where a violation of *jus cogens* norms has occurred "would reconcile the FSIA with accepted principles of international law."²⁶

The court held, however, that the *jus cogens* theory of implied waiver is incompatible with the intent requirement that is implicit in the FSIA. It referred to the examples of implied waiver set forth in the legislative history of the Act.²⁷ These examples all arose either from the foreign state's agreement to arbitrate, or to a choice of law, or from its filing a responsive pleading without raising the defense of sovereign immunity. The court also observed, "[s]ince the FSIA became law, courts have been

23. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, comment n.

24. *Federal Republic of Germany*, 26 F.3d at 1174.

25. *Id.* at 1174 (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992)).

26. *Id.* at 1174 (citing Adam Besky, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989)).

27. H.R. REP. NO. 1487, 94th Cong. 2d Sess., 18 (1976); S. REP. NO. 1310, 94th Cong. 2d Sess., 18 (1976).

reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity."²⁸

In sum, an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. In the *Princz* case, however, the court found, that neither the present government of Germany nor the predecessor government of The Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities. Thus, the court concluded that the violation of *jus cogens* norms by the Third Reich did not constitute an implied waiver of sovereign immunity under the FSIA. Rather, a clear intention by a foreign sovereign to waive its immunity is required before the federal court could assume jurisdiction over human rights abuses. The court noted further that the expansive reading of the FSIA urged by the Plaintiff would place not only a strain on the federal courts but also, and perhaps more importantly, upon the United States' diplomatic relations with the foreign governments.²⁹

However, there was a strongly worded dissent by Judge Patricia Wald. She argued that Germany implicitly waived its immunity by engaging in atrocities in this case. Reminding the court that American law incorporates international law, Judge Wald concluded that as a matter of proper statutory construction, "the only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret the act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States court by violating *jus cogens* norms."³⁰

Earlier, the Ninth Circuit has also rejected the *jus cogens* argument. The 1992 case of *Siderman de Blake v. Republic of Argentina*,³¹ involved allegations of official torture against the government of Argentina. The plaintiffs argued that when a foreign state's acts violate *jus cogens*, the state is not entitled to sovereign immunity with respect to those acts. This argument was based on the notion that *jus cogens* norms "enjoy the highest status within international law,"³² and thus "prevail over and invalidate . . . other rules of international law in conflict with them."³³

28. *Federal Republic of Germany*, 26 F.3d at 1174 (citing *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985)).

29. *Federal Republic of Germany*, 26 F.3d at 1174.

30. *Id.* at 1184.

31. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

32. *Id.* at 715 (quoting *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)).

33. *Id.* at 716 (citing RESTATEMENT (THIRD) § 102, cmt. k).

Since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*. In short, they argued that when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the state amenable to suit. The Ninth Circuit agreed that official torture is a violation of the *jus cogens* principle of international law. However, it found no implied waiver of the FSIA. The court noted that the FSIA contains no exception to immunity based on *jus cogens*. It then felt constrained to follow *Amerada Hess*, holding that "if violations of *jus cogens* committed outside the United States are to be exceptions to the immunity, Congress must make them so."³⁴

Several other lower court cases have been based on the *jus cogens* exception to the immunity. Although the courts found the arguments "appealing" and cited the law review articles with approval, they felt themselves bound by the explicit words of the statute and the restrictive reading given to it by the Supreme Court. They dismissed suits for lack of jurisdiction.³⁵

Congress has amended the FSIA in the past to address specific concerns. Addressing the problem of terrorism, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996. This Act amended section 1605 of the FSIA by adding a new subsection, which created a new exception to foreign sovereign immunity. Under this section United States nationals may bring suit against foreign sovereigns for personal injury resulting from "torture, extra judicial killing, air sabotage, hostage taking or provision of material support or services . . . for such an act" if the foreign state is designated as a state sponsor of terrorism.³⁶

This amendment to the FSIA followed the original drafting pattern used in the FSIA, and simply added an additional exception to the original five exceptions. Although very broad, this exception has several limitations on its applicability. The amendment will apply only if the foreign state is designated as a state sponsor of terrorism by the State Department. Even if a state is so designated, courts will deny jurisdiction if the victim was not a national of the United States, or if a plaintiff cannot

34. *Id.* at 719.

35. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (N.Y. 1996), *aff'd* 101 F.3d 239, (even though Libya's connection to bombing of Pan America flight 103 was in violation of *JUS COGENS*, there is no implied waiver under FSIA); *Hirsh v. State of Israel*, 962 F. Supp. 377 (S.D.N.Y. 1997), (denied implied waiver under the FSIA, relying on *Smith*); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001), (implied waiver exception under FSIA should be construed narrowly and does not include violations of *jus cogens*).

36. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, 28 U.S.C. § 1605(a)(7) (1996). States so designated include Libya, Sudan, Iraq, Iran, Syria, Cuba and North Korea.

show that the offending state was afforded "a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration."³⁷

However, as reported in the New York Times of October 25, 2001, in the last five years, judgments under the Act have brought verdicts of hundreds of millions of dollars and more than \$200 million have been paid from frozen assets and from the United States which has a right to recover from those assets.³⁸ A suit has been filed against Osama Bin Laden, al Queda, Afghanistan and the Taliban based upon the September 11th attacks.

In addition, it should be noted that the Torture Victims Protection Act (TVPA) created a civil cause of action for all individuals—aliens and United States citizens alike—who are victims of torture or extra judicial killing. The language of the act limits the jurisdiction of the courts to suits against individuals acting "under actual or apparent authority, or color of law, of any foreign nation."³⁹ By limiting the act to individuals, the drafters avoided the issue of sovereign immunity and the new law's relationship to the FSIA. They did so, however, at great cost to the effectiveness of the legislation. The tension created is evident in the language of the TVPA itself, which expressly targets official torture, yet does not reach the state sponsoring the activity.

An amendment to the FSIA could be made to allow for suits based upon violations of human rights norms that violate *jus cogens* principles. The reasons for providing such an exception are indeed compelling and would create a remedy to victims of human rights violations and deter future breaches of international human rights laws. The state violators would no longer have protection in United States courts for their transgressions.

It is clear from the cases that the courts are sympathetic to the loss of the plaintiffs in cases of human rights abuses committed by state actors. However, they have been reluctant to challenge the restrictive reading of the FSIA because of the floodgates of litigation argument and also the judgment that such decision is best left to the political branches of the government. Therefore, at this juncture, any change in this act has to come from Congress. The amendment that extends jurisdiction to terrorism-related actions is a positive first step.

37. 28 U.S.C 1605(a)(7).

38. William Glaberson, *Attack Victims Are Expected to Turn Law Against Terrorists*, N.Y. TIMES, Oct. 25, 2001 at A9.

39. TORTURE VICTIMS PROTECTION ACT, § 2(a), 28 U.S.C § 1350 (2)(a) (1994).

An amendment to the Act similar to the Anti-terrorism Act to address the concerns regarding the scope of the *jus cogens* violations is warranted. Such an exception would be a narrow one and would apply only to the most grave human rights abusers. On a practical level, an exception designed to cover *jus cogens* abuses with a narrow focus is more likely to gain Congressional approval than a proposal that covers all human rights abuses. In fact, several legislative proposals have been introduced to amend the FSIA to add an exception for immunity in cases of human rights violations but without success.⁴⁰

In view of the unwillingness of the courts to accept jurisdiction without a clear expression from Congress, it seems appropriate to urge Congress to express such intent. Despite the fact that suits against foreign governments could have broad political consequences, Congress has not been hesitant to step into the area where terrorism is concerned. It could also do so where grave human rights abuses are concerned and indeed *Amerada Hess*, and its reliance on congressional intent supports this approach.

In drafting this amendment, several questions remain. Should such suits be limited to those states branded as terrorist states by the State Department? Certainly, in this time of heightened political sensitivities and awareness, there is a question as to whether it would be prudent to allow such suits against states not on the list but are known abusers of human rights, such as China. Should such legislation permit suits to non-nationals as well as nationals? These questions should be answered before one can draft an effective immunity exception to the Act.

We do not accept state-sponsored terrorism and we ought not accept other serious violations of human rights. The 1966 Anti-Terrorism Amendment has opened the door to restricting immunity for illegal acts. A human rights exception to the FSIA would be consistent with that approach.

40. H.R. 2357, 102d Cong., 2d Sess. (1992) (introduced by Representative Lawrence J. Smith), H.R. 934, 103d Cong., 1st Sess. (1993) (introduced by Representative Mazzoli), H. R. 2363, 103d Cong., 1st Sess. (1993) (introduced by Representatives Schumer and Pallone).

RESOLVING HOLOCAUST CLAIMS AT THE END OF THE 20TH CENTURY: THE UNITED STATES GOVERNMENT'S ROLE

*Eric Rosand**

I will focus on the role the U.S. Government has played in the past few years in the resolution of a number of Holocaust-related disputes.

These recent efforts should be seen as a continuation of a more than half-century initiative by the United States to secure a measure of justice to victims of the Holocaust and their heirs. As early as 1945, Washington instructed General Eisenhower, the Commander in Chief of United States Occupation Forces, to ensure that stolen property was impounded and prompt measures for restitution instituted. In 1947, the United States military government issued restitution decrees on which German authorities modeled German restitution laws after West Germany was established in 1949. The 1952 Transition Agreement required Germany to maintain the restitution system established under Allied legislation and led to the establishment of the German system for compensating victims of Nazi persecution.

The United States played a similar role in post-war Austria as it played in Germany. The Allied Occupation forces insisted that the newly-formed Austrian Government enact legislation providing for the restitution of property illegally transferred during the Nazi era in Austria. Thus, between 1946-49, Austria passed seven—albeit not comprehensive—restitution laws. In the 1955 State Treaty, the United States subsequently demanded that Austria commit to the restitution of any remaining Jewish property that had not been restituted. A 1959 exchange of notes between the United States and Austria led to the establishment of a compensation

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fund in Vienna to provide payments to Holocaust victims for banking and certain other property claims.

Largely because of the enormity of the crimes committed and amount of property plundered during the Nazi era, however, the above measures, although significant, left gaps. Moreover, neither the measures nor the United States' diplomatic interventions resulted in the waiver of the victims' rights to pursue their claims in United States courts. Although a few such people did choose to file lawsuits in the United States in the years following the war, such suits were few and far between. By the 1990s, however, this started to change, and these suits became an irritant in the United States' relations with a number of European governments.

To some degree, the United States' recent initiatives have been triggered by the filing of such suits against European governments and companies. As a result, these efforts involved the twin goals of securing compensation or restitution for Holocaust victims and helping achieve the dismissal of the lawsuits. During this period the United States has used a variety of different methods to achieve both of these goals.

The September 1995, Princz Agreement was the first of these endeavors. After years of unsuccessful attempts to secure compensation from Germany for his suffering in a concentration camp, Hugo Princz sued the German Government in United States court. After the suit was dismissed in view of Germany's sovereign immunity, Mr. Princz then sued German companies. Simultaneously, Mr. Princz lobbied Congress to pass legislation to remove sovereign immunity from the German Government for Holocaust suits. The House of Representatives' passage of such a bill got the German Government's attention, and shortly thereafter the German Chancellor and President Clinton agreed to negotiate a traditional claims settlement agreement covering Princz and comparable claimants. The German Government, not wanting to deal with further litigation in United States court on these issues, insisted that such an agreement finally resolve all such claims. Thus, under its terms, the Germans made a lump sum (some \$20 million) payment that provided compensation essentially to concentration camp survivors who were United States citizens at the time of their internment and the United States waived all claims against Germany in that category. The Department of Justice's Foreign Claims Settlement Commission bore responsibility for distributing this money.

The United States used entirely different approaches to address subsequent major Holocaust-era related disputes. I will very briefly address the Swiss bank settlement and then turn to the agreements the United States negotiated with Germany, Austria, and France.

In the fall of 1997, the question arose of what role, if any, the State Department should play in resolving the class action lawsuits that had

recently been brought against three major Swiss banks alleging wrongdoing during the Holocaust. Our initial reaction was that this was litigation between private parties and that litigation should proceed without United States involvement. However, we soon changed our mind after the counsel for both sides requested the Department's help in resolving the dispute. We decided that our interest in getting payments to Holocaust victims and in getting rid of the lawsuits (thereby removing an irritant in our relationship with Switzerland) justified our involvement.

During these negotiations the United States Government acted as a facilitator and mediator and was intimately involved in all aspects of the process. The product was a \$1.25 billion class action settlement that was finally approved by the court in November 2000. Unlike the Prinz Agreement, where the United States not only provided the Germans with the claims waiver to address their concerns about future lawsuits but bore sole responsibility for distributing the compensation as well, under the Swiss bank settlement—a traditional class action settlement—the United States had no role to play in its implementation.

Our role in the series of negotiations between late 1998 and January 2001 that culminated in agreements—one with Germany, two with Austria, and one with France—which have led to the establishment of four foundations that will distribute some \$6 billion to Holocaust victims and their heirs was significantly different from previous ones. As the structure of the French and both Austrian negotiations and agreements were largely modeled on the one with Germany, in the interest of time, I will focus on the German one.

The talks arose in the context of both a series of class action lawsuits brought by Holocaust victims—both United States and foreign nationals—against German companies for asserting primarily Nazi-era forced and slave labor, banking and insurance claims, and an announcement by the German companies of their intention to establish a foundation to address their moral responsibility for the wrongs committed by German companies during the Nazi era.

To dispose of the lawsuits, the companies wanted the United States to conclude an executive agreement with Germany extinguishing all Nazi-era claims against German companies in United States courts. For a number of reasons, however, we declined. First, under customary international law we could have only have extinguished claims of those who were nationals at the time the claims arose. Second, customary international law does not address a government's ability to settle the claims against private entities, such as companies. Third, no United States law precedent existed for the settlement of claims of nationals against foreign private entities by executive agreement (as opposed to by treaty).

In early 1999, around the same time that the Germans announced their intention to create a foundation to pay former forced and slave laborers, they asked Stuart Eizenstat, then an Undersecretary of State, to help them find a way to dispose of the lawsuits in favor of this foundation. Soon thereafter the plaintiffs' attorneys asked for his help in facilitating an out-of-court resolution to the lawsuits. The Governments of Belarus, the Czech Republic, Israel, Poland, Russia, and Ukraine, which represented the vast majority of surviving forced and slave laborers, were eager to participate in any such negotiations. In addition, the Conference on Jewish Material Claims Against Germany, an umbrella Jewish organization that was established after the war to negotiate with Germany for compensation and restitution for Holocaust victims, rightly felt that it had to be included as well. This mix of negotiating partners was novel—government representatives, private attorneys, and a non-governmental organization—and was replicated in the Austrian and French negotiations.

The negotiations addressed four key issues: how much money the Germans would contribute to the foundation; how the money would be divided among the victims; the structure of the foundation; and a suitable mechanism to achieve the dismissal of all pending and future Nazi era lawsuits against German companies. I will briefly address the last two.

With respect to the last one, with the United States unwilling to enter into a claims settlement agreement and the German companies not prepared to enter into a traditional class action settlement (believing it would give lawsuits, which they viewed as lacking merit, both status and legitimacy), there was no available mechanism to guarantee that the companies would never again be sued in United States courts for Nazi-era wrongs. The German companies' lawyers, however, came up with an alternative concept, which was accepted. If all of the participants in the negotiations agreed on the parameters of the foundation, the participating plaintiffs' attorneys would seek to dismiss the pending lawsuits and the United States would file statements of interest in those and all future Nazi era lawsuits against German companies in United States courts. The United States would say that it would be in the United States' foreign policy interest for the foundation to be the exclusive remedy and forum for resolving such claims. Because the companies wanted the United States' commitment to file such statements of interest memorialized in an executive agreement, the United States assumed a different role than it had in prior Holocaust claims issues: negotiating an executive agreement. This turned out to be a quite unusual agreement.

Although the United States refused to discuss the actual text of the Statement, as the companies requested, it did agree to negotiate the "elements" of such a filing and attach this "elements paper" as an annex to

the agreement. The Justice Department, including the Solicitor General himself, was deeply involved, since the agreement would commit the United States to positions in all levels of United States courts. Eventually, after almost a year of heated discussions over the content of this annex with Eizenstat and Justice and State Department lawyers, it took letters from the President, his National Security Adviser, and White House Counsel to the Germans to resolve this issue. The involvement of so many different parts of the United States Government in addressing the consequences of the Holocaust, as well as negotiating the text of an executive agreement with private parties, *i.e.*, the companies, was unprecedented.

As the foundation negotiations progressed, there was a fundamental shift in approach. Rather than create a private foundation, for a number of reasons the German Government and companies decided to create a public one established under German law. This change in course led to the United States' engaging in another unprecedented role: negotiating with the Germans an annex to the executive agreement setting forth the elements of the Foundation that would be incorporated in the German law. We essentially began discussing drafts of this German law, and Eizenstat even testified before the Bundestag concerning what the United States felt needed to be included in the law. These discussions were further complicated by the need to include the victims' representatives in them. After all, the United States was only going to lend its support to a foundation that received the broad support of the victims' representatives.

Thus, in the German Foundation talks, the United States Government assumed a variety of roles, including those of a facilitator among disparate parties, a treaty negotiator, and the role of pressing a foreign government on internal law matters—roles it later assumed in negotiations with the Austrians and the French.

Let me conclude with some observations. Will the complex German Foundation arrangement and the multifaceted role played by the United States serve as precedents beyond the Austrian and French cases? The confluence of a number of circumstances in these cases enabled us to achieve the results we did achieve. First, all parties to the disputes asked the United States to help find a resolution. Second, a senior United States Government official, Stuart Eizenstat, was willing to expend the time and energy to convince initially reluctant State and Justice Departments to become involved. Third, largely because of his clout in the Clinton Administration, Eizenstat was able to get the White House to weigh in at crucial moments to break impasses that threatened to derail the negotiations. Fourth, the substance of the disputes, elderly Holocaust survivors seeking a measure of justice in the last few years of the lives,

coincided with the United States' policy objectives. Finally, there were no pre-existing treaty documents to impose legal constraints on the type of role the United States could assume.

There may be future disputes involving foreign companies or governments where some of these circumstances are replicated. However, I am skeptical that there will be any such disputes where all will be replicated.

THE SPECIAL COURT FOR SIERRA LEONE: ESTABLISHING A NEW APPROACH TO INTERNATIONAL CRIMINAL JUSTICE

*John Cerone**

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I. INTRODUCTION

The proposed Special Court for Sierra Leone is sometimes referred to as a national/international hybrid entity. There are several factors that may lead to this conclusion. Unlike the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), which were established by

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the United Nations Security Council as United Nations subsidiary bodies, the legal basis for the Special Court for Sierra Leone is a treaty between the United Nations and Sierra Leone. The substantive criminal law to be applied by the Court, while codified in the treaty, was derived from both international law and domestic law. Finally, the personnel of the Court will also be mixed, employing both international and national staff.

II. THE CONTEXT: THE CONFLICT IN SIERRA LEONE

Over the course of the past decade a very brutal civil war raged in Sierra Leone. The conflict was marked by the use of child soldiers and the severance of limbs of civilians as part of a strategy of terror. An estimated two-thirds of the population was displaced. Six hundred thousand Sierra Leoneans fled to neighboring countries.¹

In the Summer of 1999, the Government of Sierra Leone and the rebels, represented by the Revolutionary United Front (RUF), concluded the Lomé Agreement, one of a series of failed peace agreements. Under that agreement, the RUF was brought into the government, receiving cabinet and ambassadorial posts as well as the leadership of certain public sector agencies. The agreement also provided for the establishment of a Truth and Reconciliation Commission (TRC) to be established under the laws of Sierra Leone. Finally, the Government agreed to a blanket amnesty for crimes committed during the war. In adding his signature to the agreement, the United Nations envoy indicated that the amnesty would not bar prosecution for crimes under international law.² The Lomé Agreement rapidly collapsed and fighting resumed.

III. THE GENESIS OF THE SPECIAL COURT

Deeply concerned "at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity," the Security Council took up the issue of an international criminal justice mechanism for Sierra Leone in August 2000. In its Resolution 1315, the Council called upon the United Nations Secretary General to negotiate an agreement with the Government of Sierra Leone to create "an independent special court" consistent with that resolution.

Resolution 1315 contained several significant features. First, the resolution stated that the Council deemed the situation in Sierra Leone to

1. INT'L CRISIS GROUP, AFR. REPORT NO. 28, *SIERRA LEONE: TIME FOR A NEW MILITARY AND POLITICAL STRATEGY* (2001).

2. Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, para. 23, S/2000/915, Oct. 4, 2000.

constitute a threat to international peace and security in the region. Thus, while it did not proceed to invoke its Chapter VII power, the Council indicated that the situation would warrant the use of Chapter VII power if necessary. Second, the Council recalled that the amnesty provision of the Lomé Agreement was inapplicable to crimes under international law.³ Third, the Council recommended that the "subject matter jurisdiction of the special court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone." Fourth, it recommended that the special court should have "personal jurisdiction over persons who bear the greatest responsibility for the commission of" these crimes. Finally, the Council indicated that the court would be funded through voluntary (as opposed to assessed) contributions from states.

IV. DIFFERENCES BETWEEN THE SPECIAL COURT AND THE ICTY / ICTR

A. Legal Basis

The ICTY and ICTR were established by the Security Council acting under Chapter VII of the United Nations Charter.⁴ Having a Chapter VII resolution as their legal basis, all United Nations member states are obliged to cooperate with those tribunals. As with all obligations arising under the Charter, the obligation to cooperate with the tribunals is superior to other international obligations.⁵

The legal basis for the Special Court will be a treaty between the United Nations and Sierra Leone. Thus, obligations arising under that treaty will bind only the United Nations, as a legal entity, and Sierra Leone.⁶ This issue may become significant should alleged perpetrators of crimes within the jurisdiction of the Special Court flee from the territory of Sierra Leone.

3. This is reflected in the Draft Statute of the Court. Article 10 of the Draft Statute provides that "[a]n amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."

4. See U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993). U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994).

5. U.N. CHARTER, art. 103.

6. Vienna Convention on the Law of Treaties, May 3, 1969, art. 34, 8 I.L.M. 679 (1969). See also Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art. 34 & 74(3), March 21, 1986, 25 I.L.M. 543.

B. Personnel

Prosecutors and judges at the ICTY and ICTR are all international staff. The personnel of the Special Court will be mixed. The Special Court will be composed of one Appeals Chamber and one or more Trial Chambers. Of the five judges in the Appeals Chamber, three will be appointed by the United Nations Secretary General and two will be appointed by the Government of Sierra Leone. Of the three judges in each Trial Chamber, two will be appointed by the United Nations Secretary General and one will be appointed by the Government of Sierra Leone.⁷ Note that there is no requirement that the judges appointed by Sierra Leone be citizens of that country.⁸

The Prosecutor of the Special Court will be appointed by the Secretary General. He or she will have a "Sierra Leonean" Deputy Prosecutor.⁹

C. Relationship with National Courts

Similar to the ICTY and ICTR, the Special Court will have concurrent jurisdiction with national courts, but will also have primacy. Thus the Special Court will be able to take cases away from the domestic courts of Sierra Leone.¹⁰

D. Temporal Jurisdiction

As with the ICTY and ICTR,¹¹ the starting date of the Special Court's jurisdiction will be specified in the Statute of the Court. In addition, as with the ICTY but unlike the ICTR,¹² no termination date is specified. The starting date of the Special Court's temporal jurisdiction will likely be November 30, 1996.¹³ The Agreement establishing the Court will

7. Draft Statute, art. 12.

8. Report of the Secretary-General, *supra* note 2.

9. Draft Statute, art. 15.

10. Note, however, that the authority to assert primacy extends only vis-à-vis domestic courts of Sierra Leone, and cannot apply with respect to the courts of other countries, which are not parties to the treaty establishing the Court. Vienna Convention, *supra* note 6; see also *supra* text accompanying note 6.

11. The temporal jurisdiction of the ICTY extends to Jan. 1, 1991. The temporal jurisdiction of the ICTR is limited to the calendar year 1994.

12. See *id.*

13. The Government of Sierra Leone has recently requested that this date be changed to correspond with the date upon which the armed conflict is deemed to have been initiated. See *infra* note 17; see also text accompanying note 17.

terminate by agreement of the parties once its judicial activities have been completed.

E. Territorial Jurisdiction

Unlike the statutes for the ICTR and ICTY, the Draft Statute of the Special Court does not contain a separate article stipulating the Court's territorial jurisdiction. The Court will have the power, as expressed in Article 1 of the Draft Statute, "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone" Thus, while it is clear that the territorial jurisdiction of the Court will include Sierra Leone, it is conceivable that those who bear the greatest responsibility for crimes committed in Sierra Leone never set foot in the country. It may therefore be possible that acts of instigation, the ordering of atrocities, or other serious forms of complicity could be prosecuted even if they occurred outside of the territory of Sierra Leone.

The ICTY Statute limits its jurisdiction to the territory of the former Yugoslavia. The territorial jurisdiction of the ICTR covers the territory of Rwanda, as well as the territories of neighboring countries to the extent that crimes otherwise falling within the jurisdiction of the Court were committed there by Rwandan nationals.¹⁴

Note also that while the seats of the ICTY and ICTR are located outside of the territories over which those courts have jurisdiction, the seat of the Special Court will be in Sierra Leone.

F. Personal Jurisdiction

As with the ICTY and ICTR, the Special Court will have jurisdiction over natural persons only. Thus it will not have the power to prosecute organizations, as did the Nuremberg Tribunal. Further, as noted above, and as mandated by the Security Council in Resolution 1315, the personal jurisdiction of the Special Court will be limited to those "who bear the greatest responsibility for" the crimes committed.

The Draft Statute also contains a provision on jurisdiction over peacekeepers. While not excluded from the Special Court's jurisdiction, the Draft Statute provides that peacekeepers are within the primary jurisdiction of the sending state. If a state is unwilling or unable to

14. Contrast the International Criminal Court (hereinafter ICC), which is envisioned as a court of general criminal jurisdiction. The ICC Statute contains no express limitation on the Court's territorial competence. If a criminal act did not occur on the territory of a state party, the act will still fall within the competence on the court if the perpetrator is the national of a state party.

prosecute its peacekeepers, the Special Court may do so, if it receives authorization from the United Nations Security Council. Thus, there are two hurdles to the Special Court's exercise of jurisdiction over a peacekeeper. The sending state must be unwilling or unable to prosecute and the Security Council must authorize the Special Court's exercise of jurisdiction in the particular case.

The Special Court will not have jurisdiction to prosecute those under fifteen years of age at the time of the offense. While it will have jurisdictions over those between fifteen and eighteen years of age at the time of the offense, such persons will be treated as juvenile offenders. The Draft Statute provides that in

The disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies . . .

In this regard, it is also important to recall the mandate of the Court to prosecute "persons who bear the greatest responsibility." As a juvenile offender's youth would presumably mitigate his or her degree of responsibility, those under eighteen are not likely to be prosecuted.

G. Penalties

As with the ICTY and ICTR, the Special Court will not be empowered to sentence convicted persons to death. Only imprisonment will be allowed, with the exception of juvenile offenders who will be subject to the alternative measures outlined above.

H. Subject Matter Jurisdiction

The subject matter jurisdiction of the Special Court can be divided into three categories: Crimes Against Humanity, War Crimes, and Crimes under Sierra Leonean Law. Unlike the ICTY and ICTR, the crime of genocide is not within the jurisdiction of the Special Court.

As with the ICTY and ICTR, all of the crimes contained within the Draft Statute have either acquired the status of customary law or been drawn from treaties to which Sierra Leone is a party. Thus, the principle *nullem crimen sine lege* is respected.

1. Crimes Against Humanity

Article 2 of the Draft Statute contains the definition of Crimes Against Humanity. As with all definitions of crimes against humanity, Article 2 sets forth contextual elements as well as a list of enumerated acts that will constitute Crimes Against Humanity if the contextual elements are established.

The definitions in the statutes of the two ad hoc tribunals are almost identical. However, there are two critical distinctions in the contextual elements of each. That is, the definition in each of the two statutes requires a contextual element that the other does not. Under the ICTY Statute, the existence of a state of armed conflict is a required element. Under the ICTR Statute, the attack within which the crimes occur must be launched on discriminatory grounds. As defined in the Draft Statute, Crimes Against Humanity requires neither of these contextual elements. It requires only that there be a widespread or systematic attack directed against any civilian population. This definition is therefore broadly in accord with the definition established in the Statute of the International Criminal Court (ICC), and with what is generally considered to be the definition under customary law.

The lists of enumerated acts contained in the ICTY and ICTR Statutes are identical. While the acts listed in Article 2 of the Draft Statute are similar, there are some important differences. First, in addition to politics, race, and religion, ethnicity is included as a grounds for persecution. Second, borrowing language from the ICC Statute, Article 2 includes "sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence" as additional acts constituting Crimes Against Humanity if the contextual elements are met, *i.e.*, if committed as part of a widespread or systematic attack against any civilian population.

2. War Crimes

War Crimes are divided between two articles in the Draft Statute. Article 3 concerns Violations of Common Article 3 and Additional Protocol II. Article 4 is entitled Other Serious Violations of International Humanitarian Law.

Article 3 of the Draft Statute essentially contains the law of non-international armed conflict. It is virtually identical to Article 4 of the ICTR Statute. While not expressly set forth in the ICTY Statute, the law of non-international armed conflict has been read into Article 3 of the ICTY Statute, which covers "[v]iolations of the laws or customs of war."¹⁵

15. The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, IT-94-1-AR72 (RP D6413-D6491).

Article 4 lists certain serious war crimes that have occurred during the conflict in Sierra Leone, and is thus specific to the Draft Statute. These acts include attacks against civilians, attacks against peacekeepers and those providing humanitarian assistance, and the use of child combatants. Thus, Article 4 permits prosecution for:

- a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; and
- c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

3. Crimes Under Sierra Leonean Law

Certain crimes under Sierra Leonean law are set forth in Article 5 of the Draft Statute. Again, the acts listed correspond to acts that have occurred in the course of the conflict in Sierra Leone. This article is also unique for obvious reasons.

The crimes are drawn from the Prevention of Cruelty to Children Act of 1926 and the Malicious Damage Act of 1861. The first crime listed is abusing a girl or abducting a girl for immoral purposes. The second relates to the wanton destruction of property, and is specifically concerned with arson.

V. THE CURRENT STATE OF PLAY: OCTOBER 2001

At present, the United Nations Secretariat is preparing to dispatch a planning mission to Freetown. The purpose of the mission will be two-fold. First, the mission will be responsible for making the practical arrangements for the establishment of the Court. Second, the mission is also charged with drafting guidelines, in consultation with the United Nations Mission in Sierra Leone (UNAMSIL) and the Office of the High Commissioner for Human Rights (OHCHR), regarding the relationship between the Special Court and the TRC.¹⁶

Finances for the Special Court remain a concern. Recall that the Special Court is to be funded through voluntary contributions of states. Even though the budget has been drastically reduced from initial

16. OHCHR has taken a lead role in facilitating the establishment of the TRC.

projections, sufficient funds have yet to be deposited for the first year of operations.

Finally, the issue of the temporal jurisdiction of the Court has recently been re-opened. While the Government of Sierra Leone continues to express full support for the Court, it has requested a modification to its proposed temporal jurisdiction. On August 20, 2001, the Government sent a letter to the United Nations Office of Legal Affairs requesting that the temporal jurisdiction of the Special Court extend back to March 1991, coinciding with the inception of the armed conflict.¹⁷ At present, this issue remains unresolved.

17. Eleventh report of the Secretary-General on the United Nations Mission in Sierra Leone, Sept. 7, 2001, para. 48, U.N. Doc S/2001/857.

THE INTERNATIONAL TRIAL OF SLOBODAN MILOSEVIC: REAL JUSTICE OR REALPOLITIK?

Michael P. Scharf

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I. INTRODUCTION: SCAPEGOAT OR WAR CRIMINAL?

There were disquieting echoes of Nuremberg at the arraignment of Slobodan Milosevic in The Hague on July 3, 2001. Standing before the three-judge panel, Milosevic challenged the Security Council-created War Crimes Tribunal's validity. "You are not a judicial institution; you are a political tool," Milosevic told the panel. Drawing on the commonly-accepted notion that the post-World War II Nuremberg Trials were tainted by "victor's justice," Milosevic's initial trial strategy was to attempt to discredit the Yugoslavia Tribunal's legitimacy and impartiality.

Will history remember Milosevic as a victim of victor's justice, a scapegoat tried in a show trial before a one-sided court? Or will the Milosevic trial be seen as fair and free of political influence? More than

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anything else, the answer to these questions may dictate the ultimate success or failure of the proceedings.

If viewed as legitimate, the trial of Milosevic could potentially serve several important functions in the Balkan peace process. By pinning prime responsibility on Milosevic and disclosing the way the Yugoslav people were manipulated by their leaders into committing acts of savagery on a mass scale, the trial would help break the cycle of violence that has long plagued the Balkans. While this would not completely absolve the underlings for their acts, it would make it easier for victims to eventually forgive, or at least, reconcile with former neighbors who had been caught up in the institutionalized violence. This would also promote a political catharsis in Serbia, enabling the new leadership to distance themselves from the discredited nationalistic policies of the past. The historic record generated from the trial would educate the Serb people, long subject to Milosevic's propaganda, about what really happened in Kosovo and Bosnia, and help ensure that such horrific acts are not repeated in the future.

On the other hand, a trial that is seen as "victor's justice" would undermine the goal of fostering reconciliation between the ethnic groups living in the former Yugoslavia. The historic record developed by the trial would forever be questioned. The trial would add to the Serb martyrdom complex, amounting to another grievance requiring vengeance. In addition, the judicial precedent would be tainted. For any real advance to be made in the long march toward the establishment of a permanent international criminal court, Milosevic's trial must be seen to be more about real justice than realpolitik.

II. THE MISTAKES OF THE PAST

History's first international criminal court was the Nuremberg Tribunal, created by the victorious Allies after World War II to prosecute the major German war criminals. Although Adolf Hitler escaped prosecution by committing suicide, many of the most notorious German leaders were tried before the Nuremberg Tribunal. After a trial that lasted 284 days, nineteen of the twenty-two German officials tried at Nuremberg were found guilty, and twelve were sentenced to death by hanging. As the former Serb president, himself, is keenly aware, Nuremberg provides a compelling benchmark for assessing the legitimacy of the trial of Slobodan Milosevic.

The United States Chief Prosecutor at Nuremberg, Supreme Court Justice Robert Jackson, noted in his opening statement at the Nuremberg trial that "we must never forget that the record on which we judge these

defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well." Given Jackson's admonition, it is ironic that history has not been altogether kind to the Nuremberg Tribunal.

In the years following its judgment, there have been three main criticisms levied on the Nuremberg Tribunal: first, that it was a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law committed during the war; second, that the defendants were prosecuted and punished for crimes expressly defined for the first time in an instrument adopted by the victors at the conclusion of the war; and third, that the Nuremberg Tribunal functioned on the basis of limited procedural rules that inadequately protected the rights of the accused.

While the Nuremberg Tribunal deserves praise as a novel endeavor that paved the way for future war crimes tribunals and the development of international criminal law, these criticisms are not without foundation. It was true, for example, that only the leading victorious nations—the United States, United Kingdom, France, and the Soviet Union—were represented on the Nuremberg Tribunal's bench. There were no judges from neutral states, and the defendants were confined to German political and military leaders. None of the Allied commanders had to answer for similar crimes.

Moreover, the Nuremberg judges oversaw the collection of evidence and judged the defendants in a necessarily political arena, thereby raising questions about their ability to objectively preside over the trials. Most astonishing of all, however, was the fact that two of the Judges of the Nuremberg Tribunal, General Nikitchenko (Soviet Union) and Robert Falko (Alternate, France), served earlier as members of the committee that had drafted the Nuremberg Charter and the indictments. Having written the law to be applied and selected the defendants to be tried, it is hard to believe they could be sufficiently impartial and unbiased. And yet, they were insulated from challenge since the Nuremberg Charter stipulated that neither the Court, nor its members, could be challenged by the prosecution or the defendants.

In addition, the States which tried the Nuremberg defendants were arguably guilty of many of the same sorts of crimes for which they sat in judgment over their former adversaries. Had Germany and Japan won the war, American leaders could just as easily have been prosecuted for crimes against humanity in relation to the dropping of the atomic bombs, firebombing civilian centers, and conducting unrestricted submarine warfare. Soviet leaders could have been prosecuted for waging aggressive war and mistreatment of prisoners with respect to the forcible Soviet annexation of the Baltic States and appalling record of the Soviets

regarding the treatment of prisoners of war. Most reprehensible of all, however, was the Soviet Union's insistence that the German defendants be charged with responsibility for the Katyn Forest Massacre, in which 14,700 Polish prisoners of war were murdered in 1941—when the true perpetrators of this atrocity, we now know, were the Soviets and not the Germans.

Perhaps the most often-heard criticism of Nuremberg was its application of *ex post facto* laws, by holding individuals responsible for the first time in history for waging a war of aggression and by applying the concept of conspiracy which had never before been recognized in continental Europe. One of the first to voice this criticism was Senator Robert Taft of Ohio in 1946, but it was not until John F. Kennedy reproduced Taft's speech in Kennedy's Pulitzer Prize-winning 1956 book, *Profiles of Courage*, that this criticism became part of the public legacy of Nuremberg. To this day, articles appear in the popular press deriding Nuremberg as "a retroactive jurisprudence that would surely be unconstitutional in an American court."

The other major criticism was that the Nuremberg Charter failed to provide sufficient due process guarantees to the defense, and that those it did provide were circumscribed by several pro-prosecution judicial rulings. The most notable of such rulings was the Tribunal's decision to allow the prosecutors to introduce *ex parte* affidavits (depositions taken out of the presence of the accused or his lawyer) of persons who were in fact available to testify at trial. In addition, the Nuremberg Tribunal prevented the defendants from having access to the Tribunal's evidentiary archives assembled by the Allies, and it allowed only the Prosecution the right to object to witnesses before questioning. Such rulings were particularly troubling because the Nuremberg Tribunal did not provide for a right of appeal.

Even Justice Jackson acknowledged at the conclusion of the Nuremberg Trials that "many mistakes have been made and many inadequacies must be confessed." But he went on to say that he was "consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future."

III. IMPROVEMENTS OVER NUREMBERG

In keeping with Justice Jackson's aspiration, the drafters of the Yugoslavia Tribunal's Statute were determined to prevent this modern-day Nuremberg Tribunal from being subjected to the kinds of criticisms that have tarnished the legacy of its predecessor. And the judges of the Yugoslavia Tribunal have recognized that they must do better than their

brethren did fifty-years earlier at Nuremberg; they must ensure that the Yugoslavia Tribunal is perceived as scrupulously fair.

In some respects, the Yugoslavia Tribunal is a vast improvement over its predecessor. Its detailed Rules of Procedure and Evidence, for example, represent a tremendous advancement over the scant set of rules fashioned for the Nuremberg Tribunal. Further, in contrast to the Nuremberg Tribunal, the Yugoslavia Tribunal prohibits trials *in absentia*, which are inherently unfair and are likely to be seen as an empty gesture. And where the defense attorneys at Nuremberg were prevented from full access to the Nuremberg Tribunal's evidentiary archives, defendants before the Yugoslavia Tribunal are entitled to any exculpatory evidence in the possession of the Prosecutor, and both the prosecution and the defense are reciprocally bound to disclose all documents and witnesses prior to trial.

With respect to Nuremberg's application of *ex post facto* laws, the creators of the Yugoslavia Tribunal went to great lengths to ensure that the Yugoslavia Tribunal could not be subject to similar condemnation. Beginning in 1992, the Security Council adopted a series of resolutions that put the leaders of the former Yugoslavia on notice that they were bound by existing international humanitarian law, in particular the Geneva Conventions and Genocide Convention. The resolutions enumerated the various types of reported acts that would amount to breaches of this law, and warned that persons who commit or order the commission of such breaches would be held individually responsible. Moreover, the jurisdiction of the International Tribunal is defined on the basis of the highest standard of applicable law, namely rules of law which are beyond any doubt part of customary law, to avoid any question of full respect for the *ex post facto* principle—known internationally by the Latin phrase *nullem crimen sine lege*. It is particularly noteworthy that the crime of waging a war of aggression, which engendered so much criticism after Nuremberg, is not within the Yugoslavia Tribunal's Jurisdiction. Ironically, it is the one crime that might have been easiest to prove against Milosevic.

IV. THE LEGITIMACY OF THE YUGOSLAVIA TRIBUNAL

While the Nuremberg Charter precluded challenges to the legitimacy of the Nuremberg Tribunal itself, the Yugoslavia Tribunal considered the question in its first case in 1996. The Tribunal ruled that, although its creation by the Security Council was without precedent, it was a valid product of the Security Council under the Council's broad powers to take action to maintain international peace and security. But, as Milosevic may be quick to point out, the judges that made that decision could not be

seriously expected to decide the issue impartially, given that their incredibly prestigious, \$200,000-per-year jobs would have been instantly extinguished if they had decided otherwise.

Having rendered that decision, the Yugoslavia Tribunal is unlikely to revisit the question in the Milosevic trial. In response to Milosevic's challenges to the Tribunal's legitimacy at a pre-trial hearing in August 2001, Presiding Judge Richard May responded, "Mr. Milosevic, we are not going to listen to these political arguments." While this might seem unduly harsh, it is a bit late in the day for Milosevic to be challenging the Tribunal on this ground, given that he recognized the legitimacy of the Tribunal when he signed the Dayton Accords in 1995, which require the parties to cooperate with the Tribunal. Any doubt should have been erased when Milosevic authorized the transfer of Drazen Erdemovic for prosecution before the Tribunal for the part the young Serb soldier played in the massacres at Srebrenica.

Having failed to convince the Yugoslavia Tribunal to reconsider this issue, Milosevic attempted to attack the legitimacy of the Tribunal in the Hague District Court. But the Dutch Court declared itself incompetent to consider the question.

V. VICTOR'S JUSTICE

If Milosevic's goal is not to obtain a dismissal but to publicly discredit the Tribunal, he may have a greater chance of success with his argument that the Yugoslavia Tribunal, like Nuremberg, represents "victor's justice."

In contrast to Nuremberg, however, the Yugoslavia Tribunal was created neither by the victors nor by the parties involved in the conflict, but rather by the United Nations, representing the international community of States. The judges of the Yugoslavia Tribunal come from all parts of the world, and are elected by the General Assembly, in which each of the world's 188 countries gets an equal vote. Moreover, the message of the International Tribunal's indictments, prosecutions, and convictions to date of Muslims and Croats, as well as Serbs, has been that a war crime is a war crime, whoever it is committed by. The Tribunal has taken no sides.

On the other hand, the decision to establish the Yugoslavia Tribunal was made by the United Nations Security Council, which cannot truly be characterized as a neutral third party; rather, it has itself become deeply involved and taken sides in the Balkan conflict. The Security Council has, for example, imposed sanctions on Milosevic's Serbia, which it felt was most responsible for the conflict and atrocities. Throughout the conflict, the Security Council had been quite vocal in its condemnation of Serb

atrocities, but its criticisms of those committed by Muslims and Croats were comparatively muted. And, most problematic of all, three of the Permanent Members of the Council—the United States, France, and the United Kingdom—led the 78-day bombing campaign against Milosevic and Serbia in 1999.

While both the Prosecutor and the Judicial Chambers of the Yugoslavia Tribunal were conceived to be independent from the Security Council, one cannot ignore the fact that the Statute provides that the Tribunal's Prosecutor is selected by the Security Council. The Judges are selected by the General Assembly from a short list proposed by the Security Council, and they have to stand for re-election after a four-year term. Moreover, the operation of the Tribunal has been dependent on hundreds of millions of dollars in contributions from the United States and its Western allies. And most of the staff of the office of the International Prosecutor are on loan from NATO countries.

Although a creature of the United Nations, the Tribunal has, according to its former president, Antonio Cassese, tended to "take into account the exigencies and tempo of the international community." There are those who would argue that this means that the Tribunal has yielded to the objectives of the United States and other NATO powers, without whose financial and military support the Tribunal could not function.

VI. THE TIMING OF THE INDICTMENT

For evidence of the political influence of the United States on the Yugoslavia Tribunal, Milosevic can turn to the suspicious timing of his indictment. It was issued on May 22, 1999, sixty days into the 78-day NATO bombing campaign against Serbia. The indictment came down at a crucial time when popular support for the intervention was waning in several NATO countries in the face of intense press criticism of NATO's use of cluster bombs and depleted uranium munitions, attacks on civilian trains, truck convoys, and media centers, and the accidental bombings of the Chinese Embassy in Belgrade and the territory of neighboring Bulgaria. If this forced a premature end to the bombing campaign, American officials feared that it might irrevocably damage the credibility of NATO, potentially leading to its demise.

After years of pressuring the International Prosecutor not to indict the Serb leader whose cooperation was seen as essential for the Balkan peace process, suddenly the United States was pressing for the immediate issuance of charges against Milosevic, knowing that such action would bolster the political will of the NATO countries to continue the bombing campaign, and ultimately force Milosevic to accept NATO's terms for

Kosovo. And after years of refusing to turn over sensitive intelligence data to the Tribunal in order to protect "sources and methods," the United States and Britain were hurriedly handing over reams of satellite imagery, telephone intercepts, and other top-secret information to help the Prosecutor make the case against Milosevic.

To make matters even more questionable, a few weeks after issuing the Milosevic indictment, the International Prosecutor, Louise Arbour, was given her dream job: the only seat on the Supreme Court of Canada open to an Ontario resident that was likely to be available during her professional lifetime. One doesn't need to use much imagination to guess what would have happened to Arbour's judicial prospects if, instead of indicting Milosevic, she had issued an indictment charging NATO leaders with war crimes in the midst of the intervention.

VII. THE MANNER OF MILOSEVIC'S SURRENDER

The newly elected President of the Federal Republic of Yugoslavia, Vojislav Kostunica, backed up by a federal court ruling, refused to permit the extradition of Milosevic to The Hague. But in a late-night move that caught everyone off guard, Kostunica's political rival, Prime Minister Zoran Djindjic, instructed the Serb police under his command to secretly take Milosevic to an American air base in Tuzla, Bosnia, from which Milosevic was transferred by military jet to The Hague on July 28, 2001. In announcing the action, Djindjic said that he had been forced to take a "difficult but morally correct" decision to protect the interests of Serbia (that is, the United States and its European allies were promising \$1.28 billion in aid in return for the surrender of Milosevic). Immediately thereafter, a furious Kostunica protested that the extradition of Milosevic was "illegal and unconstitutional."

Meanwhile, on board the flight to The Hague, Milosevic reportedly told the tribunal officials who read him his rights, "You are kidnapping me, and you will answer for your crimes." In analogous cases (*Stoeck v. Germany* (1991) and *Bozano v. France* (1986)), the European Court of Human Rights has held that luring or abduction in violation of established extradition procedures is a human rights violation for which dismissal is the appropriate remedy. But the Yugoslavia Tribunal rejected the argument in the *Dokmanovic Case* (1997) on the ground that there does not exist a formal extradition treaty between the Tribunal and the Federal Republic of Yugoslavia.

Whatever the technical legal merits of his argument, politically, the timing of Milosevic's surrender could not be worse for the Tribunal. He arrived at the Yugoslavia Tribunal on St. Vitus's day, the solemn holiday

commemorating the historic Serb defeat to the Ottoman Turks at the battle of Kosovo Polje in 1389, which figures so prominently into the Serb mythology of victimization.

VIII. UNCLEAR HANDS

To further illustrate the Tribunal's politicization, Milosevic will attempt to force the Tribunal to face the *tu quoque* argument (literally meaning "you too"). First, Milosevic may point out that Franjo Tudjman, the former leader of Croatia, was never indicted by the Tribunal for the mass atrocities that Croatian troops committed against the Serbs in re-taking Serb-controlled areas of eastern Croatia. In fact, Tudjman was welcomed to the United States for cancer treatment at Walter Reed Hospital in Washington, D.C., a few months before his death in 1999.

Next, Milosevic will raise the issue of NATO war crimes. When several respected human rights organizations urged the Tribunal to investigate the possibility that NATO had committed war crimes during the 1999 intervention, the then Prosecutor, Louise Arbour (from Canada, a NATO country), assigned the task to her Legal Adviser, William Fenrick. Fenrick is an ex-NATO lawyer, who went to the tribunal directly from his post as director of law for operations and training in the Canadian Department of Defense. Not surprisingly, Fenrick's report, which was released in June 2000, concluded that NATO had committed no indictable offenses. But critics have been quick to seize upon the clause of the report that notes that the review of NATO's actions relied primarily on public documents produced by NATO, and that the authors of the report "tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given."

Finally, Milosevic may argue that the United States opposition to a permanent international criminal court has undermined its moral right to participate in any way in the trial of Milosevic. According to United States officials, such international tribunals are prone to politicization—the very argument that Milosevic has made about the Yugoslavia Tribunal.

There are several answers to Milosevic's *tu quoque* arguments. First, whatever Franjo Tudjman and NATO have done, their actions do not excuse what Milosevic did. Second, the Tribunal's Prosecutor at the time of the Milosevic indictment, Louise Arbour, has stated that she was about to issue an indictment for Franjo Tudjman just before the Croatian President passed away, demonstrating that the Tribunal was striving to be evenhanded. Third, whether or not one believes NATO violated the laws of war during the 1999 bombing campaign, NATO did not systematically set out to kill and torture civilians on a mass scale—the crimes of which

Milosevic has been accused. The alleged NATO offenses are just not in a league with those of which Milosevic is charged. Fourth, established democracies have mechanisms (a free press, political opposition, and an independent judiciary) to examine publicly their own past: for example, America's actions in Vietnam or France's use of torture in Algeria. While Serbia was willing to try Milosevic for corruption, the Yugoslavia Tribunal is the only venue in which his war crimes and crimes against humanity could be exposed.

Finally, these arguments might suggest that the Tribunal's Prosecutors might have been out to get Milosevic. But selective prosecution is never a valid defense, even in domestic trials. Milosevic's ultimate fate is in the hands of the Tribunal's judges, not its prosecutor. As long as the bench is impartial, and the procedures are equitable, the trial of Milosevic will be considered credible.

IX. COMPOSITION OF THE BENCH

Given that the pool of the Tribunal's judges that were available for the Milosevic trial included citizens from several countries that had no stake in the Balkan conflict, the three judges assigned by Chief Judge Jorda to preside over the case represented a most unfortunate selection. The judge selected to head the panel, Richard May, hails from one of the NATO countries (the United Kingdom) that led the 1999 intervention against Serbia. May is said to have close continuing contacts with the British Foreign Ministry. The second judge, Patrick Robinson, is from Jamaica, a Caribbean country with very close political and economic ties to the United States and United Kingdom. Having served with Judge May on other trials, Robinson is said to be somewhat too deferential to his British associate on the bench. Only the third judge, O-Gon Kwan of South Korea, who replaced the judge originally assigned to the trial, Mohamed El Habib Fassi Fihri of Morocco, hails from an unquestionably neutral country.

These distinguished jurists could not be expected to recuse themselves from participating on the Milosevic bench because, that would be an admission of their bias and would subvert the credibility of the Tribunal as a whole. And yet, however fair and impartial these judges actually turn out to be, one can certainly understand why some might perceive that the "fix is in." In this regard, Osgoode Hall Law Professor Michael Mandel maintains that "Milosevic has about as much chance of getting a fair trial from this court as he had of defeating NATO in an air war."

X. FAIRNESS OF THE PROCEDURES

In addition to an impartial bench, the validity of the trial depends on the court allowing Milosevic the equality of arms and fair procedures which the Nuremberg defendants did not receive.

Another criticism of Nuremberg that Milosevic will attempt to resurrect was that the Nuremberg Tribunal did not comport with due process because it permitted the prosecution to base much of its case on hearsay evidence and *ex parte* affidavits. In its previous cases, the Yugoslavia Tribunal has similarly permitted unfettered use of hearsay by prosecution witnesses, as well as anonymous witnesses, whose identities are not provided to the defendant or defense counsel. These rulings have undermined the right to examine or cross-examine witnesses supposedly guaranteed by the Yugoslavia Tribunal Statute. Simply put, the right of confrontation cannot be effective without the right to know the identity of adverse witnesses. With the stakes as high as they are in the Milosevic trial, it is unlikely that the Tribunal will permit anonymous witnesses, and it will probably be far more circumspect with regard to the use of hearsay evidence.

Another criticism of the Nuremberg procedures was that those acquitted by the Tribunal were retried and convicted in subsequent proceedings before national courts. The Statute of the Yugoslavia Tribunal, in contrast, expressly protects defendants against double jeopardy by prohibiting national courts from retrying persons who have been tried by the International Tribunal. However, by permitting the Tribunal's Prosecutor to appeal an acquittal, Milosevic may argue that the Tribunal itself infringes the accused's interest in finality which underlies the double jeopardy principle.

As the United States Supreme Court has said, "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that a verdict of acquittal ... could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." The proscription of the Double Jeopardy Clause applies no matter how erroneous or ill-advised the trial court's decision appears to the appeals court. The rationale for the American rule is that permitting a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that even though innocent, he may be found guilty. This rationale is just as applicable to prosecution before an international criminal court as to domestic prosecutions. The Yugoslavia Tribunal's Office of Prosecutor, together with State authorities assisting that office, will have the full

resources of the Tribunal and several interested States behind it, while Milosevic and his counsel have minimal resources at their disposal.

Yet, this expansive notion of double jeopardy is a uniquely American judicial concept. Other common law countries such as Australia, Canada, and the United Kingdom permit their prosecutors to appeal acquittals. And while it may offend American sensibilities, a prosecutorial appeal is perfectly consistent with international standards of due process, as well as with the practice of the courts in Serbia. In light of the unique function of the Yugoslavia Tribunal, prosecutorial appeals may be important to ensuring uniform precedent

XI. CONCLUSIONS

As described above, Slobodan Milosevic adopted a trial strategy of attacking the legitimacy of the International Tribunal at every opportunity rather than trying to prove his innocence of the charges against him. But his refusal to "play by the rules" was blunted somewhat by the Tribunal's clever decision on the eve of trial to appoint three distinguished defense counsel to act as "friends of the court" and thereby to ably build Milosevic's defense in court, regardless of his wishes.

In the end, Milosevic may still be able to convince many throughout the world that the Yugoslavia Tribunal is not quite the impartial international justice system, immune from big power influence, that its founders had promised. But only starry-eyed idealists could ever have imagined that power politics would play no part in the timing and targeting of the Tribunal's indictments. By way of comparison, despite its shortcomings, few today question the validity of the judgment of the Nuremberg Tribunal because the defendants were convicted on the strength of their own meticulously-kept documents. Similarly, if the International Prosecutor is able to prove the case against Milosevic with compelling evidence, Milosevic will have a much harder time convincing anyone that his trial represents a denial of justice.

But, one of the modern myths of Nuremberg is that the German people immediately accepted the legitimacy of the Tribunal. Opinion polls conducted by the United States Department of State from 1946 through 1958 indicated that a large majority of West Germans considered the Nuremberg proceedings to be nothing but a show trial, representing victor's justice rather than real justice. Yet two generations later, the German people largely speak of the Nuremberg Tribunal with respect, and Germany is the foremost advocate of the permanent international criminal court. Perhaps this suggests that regardless of the strength of the evidence, the Serb people will not immediately embrace the findings of the

Yugoslavia Tribunal in the Milosevic case, and that the question of its success will await the judgment of future generations.

STRETCHING THE LIMITS OF INTERNATIONAL LAW: THE CHALLENGE OF TERRORISM

*Asli Bâli**

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I. INTRODUCTION

When this panel was originally conceived, we could not have anticipated the extent to which the limits of international law would have to be stretched by events in the city where our conference would be held. Our thinking about the pace and nature of changes shifting the boundaries of international law have had to be radically revised and the aftermath of September 11th has necessarily prompted a significant change in the thinking about the limits of international law. In the place of the sense of confidence in the consistent deepening of globalization, and the attendant web of international legal frameworks for the regulation of transnational activity, we are confronted with a sudden pessimism of the impotence of law in the face of violence. Rather than taking up the question of evolving practices of inclusion in and exclusion from international participation, as I had originally intended, I will focus my discussion on the available paradigms through which we might understand the spectrum of international options in responding to the attacks of September 11th.¹ This

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1. There is a subtle relationship between this question and the original subject of my remarks, but the constraints of the presentation on which these remarks are based did not allow more than an allusion to this link. Practices of inclusion in and exclusion from international participation—by which I mean formal mechanisms of recognition and accession to international legal regimes, as well as informal mechanisms for the entry into or exclusion from regular channels of inter-state transactions—can also be described as strategies of engagement or

subject requires a somewhat more prescriptive approach than legal academics are in the habit of adopting. However, the urgency of the current international crisis, and the convergence of policy and legal approaches on the question of designing new mechanisms to counter terrorism, warrants stepping out of character.

The first question to which we must turn our attention in asking how to wage the battle against terrorism is whether we are best served by conceptualizing the attacks as criminal acts or acts of war.² While there

containment. The classic mechanism of inclusion is the entry into diplomatic relations. The classic mechanism of exclusion is the withholding of recognition or the imposition of sanctions. Between these examples, there is a wide array of practices of inclusion and exclusion that may be considered. Recent trends in American foreign policy, including the use of unilateral and multilateral sanctions, has given rise to the question whether the formal mechanisms of membership in the international community (recognition as a declaratory statement that an entity meets the objective test of statehood through effective control of its territory) are being displaced by the development of normative or quasi-normative criteria governing inclusion in and exclusion of states from participation in a variety of international fora. For an example of the definition of this "objective test," see the Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3099, 165 L.N.T.S. 19, 21 (providing that "[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.").

The question, when we turn our attention to developing responses under international law to the threat of terrorism, is whether there is any effective means of "containing" terrorism through exclusionary practices whereby states are subjected to coercive intervention. As I will suggest below, treating terrorism as an international crime, and attacks of the kind witnessed on September 11th as massive crimes against humanity, would permit the invocation of principles of universal jurisdiction in the pursuit of those responsible for such acts, wherever they may be located. Under such a conception, states may be engaged through a series of international legal obligations in a transnational effort to pursue, prosecute and punish terrorists found within their territory, with appropriate sanctions associated with the failure to do so. For a discussion of proposed principles for the implementation of universal jurisdiction through national courts, see STEPHEN MACEDO, *THE PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* (2001). In contrast, to treat acts of international terrorism as acts of war authorizing the use of force against territories from which terrorists may operate suggests a military paradigm for countering the threat of terrorist violence. Where the use of force encompasses not only those responsible for terrorist acts, but states where they may be present (with no necessary requirement of state-sponsorship) such a strategy would contribute to the development of exclusionary mechanisms under international law by broadening the grounds on which states may become subject to coercive intervention. However, the effectiveness of conventional uses of force in combating what may be a transnational phenomenon not bound to a particular territorial base is questionable, especially when the high costs to the international system of destabilizing military interventions and their aftermaths are taken into consideration. I will provide principled and pragmatic arguments for the privileging of a legalist paradigm over a military one. For the purposes of the remainder of this discussion, however, the inclusionary or exclusionary implications of different strategies in combating terrorism are of secondary concern, and will have to be left to be taken up elsewhere.

2. Although this has been conceived as an either/or question in most discussions of the status of the attacks under international law, it is more accurate to say that the attacks blurred the lines between criminal acts and acts of war. The question remains, however, whether the appropriate response to the attacks should draw more on the resources in international law to

are strong arguments for both paradigms, when viewed from the perspective of fashioning an effective, long-term strategy for countering international terrorism, I will argue that drawing on international criminal law is the more promising avenue of response. In particular, I will make the case that adopting a politico-military approach rather than a legalist paradigm undermines the effectiveness of international law, in ways dangerous to international order, and potentially detrimental to efforts to prevent and punish acts of terrorism. In the third section of this essay, I will turn to the question of the resources already available in international law, and the ways that the boundaries of international law may be shifted, to address terrorism.

II. TWO PARADIGMS FOR AN INTERNATIONAL RESPONSE TO TERRORISM: POLITICO-MILITARY AND INTERNATIONAL-LEGALIST

While the September 11th attacks were an unprecedented form of international terrorism, international law is not without resources for developing an appropriate and effective response. International law, like all bodies of law, develops through the application of precedents to like cases, or the adaptation of precedents to suit new circumstances by way of extrapolation and analogy. There are two relevant precedents for considering how an international response to massive terrorist attacks may be fashioned in the wake of the September 11th attacks. The first is the Nuremberg war crimes tribunal,³ and the international legalist paradigm

address transnational crime or whether there should be a reliance on the use of force. This is the question that I mean to evoke here, and not the diversionary debate over the fit between the attacks and pre-existing conceptions of terrorism and war. *See also infra* note 7.

3. One challenge to the applicability of the Nuremberg precedent and the developing practice of international criminal tribunals in this context is that in each case these tribunals have been convened in the aftermath of a war or crime against humanity. According to this reasoning, the use of international tribunals cannot be relevant until the conclusion of the military campaign against the particular terrorist organization or network implicated in the September 11th attacks. But this argument presumes the necessity of undertaking military action in response to the attacks and subordinates the use of an international tribunal to a secondary and subsequent phase of response. If, however, the convening of an international criminal tribunal were considered as an *alternative* to a military approach, this objection ceases to be relevant. That is, if the attacks of September 11th were conceptualized as a crime against humanity, then the convening of the tribunal would clearly be subsequent to the crime, and thus the timing objection would have been met.

Aside from this timing objection, however, there are at least three other disadvantages that may be cited to convening international tribunals to prosecute terrorists for crimes against humanity: 1) the difficulty of apprehending the perpetrators; 2) the inadequacy of international criminal law to the task of deterring transnational crime; and 3) the risk of acquittal.

The first two objections are pragmatic, and as a matter of practical urgency, will be resolved. In the first case, transnational efforts to develop an international policing capacity, through the United Nations or through a specific, separate multilateral framework, are long

that developed out of that precedent, leading to the creation of the International Criminal Tribunal for the former Yugoslavia (the "ICTY"),⁴ the International Criminal Tribunal for Rwanda (the "ICTR"),⁵ and ultimately the drafting of the statute for the International Criminal Court (the "ICC").⁶ The other is the Kosovo War of 1999, with the political and military paradigm of a coalition that represents a subset of the international community and that operates outside of a United Nations framework to undertake an enforcement action in response to aggression or crimes

overdue. In response to the second objection, one can readily point to the tremendous acceleration in the formulation of international criminal law over the last decade. The particular objection in this instance could be overcome by the convening of an *ad hoc* tribunal, the statute of which would provide all of the relevant legal grounds necessary for prosecution. I discuss this option below. Beyond this, the deterrence debate is one intrinsic to all instances of criminal prosecution, whether domestic or international. While no application of law can fully deter extremism, raising the costs of sponsoring or facilitating terrorist acts will serve as an important deterrent to state sponsorship. A full discussion of the deterrent value of a legalist paradigm, with all of its complexity, is beyond the scope of this essay. For one thorough analysis of the question of deterrence in applications of international criminal law, see JUDITH SHKLAR, *LEGALISM* (1964).

As for the third objection, it seems misplaced. In the past, international criminal tribunals, including the Nuremberg tribunal, have issued a (quite limited) number of acquittals. In light of the magnitude of the crimes against humanity in question at Nuremberg, and in the ICTY and the ICTR, if the risk of acquittal was deemed acceptable in these cases (and in the cases of the latter two tribunals, they were convened in the absence of the "total" military defeat of the parties accused of the crimes), then it is difficult to imagine the distinct principled or pragmatic argument against permitting the possibility of acquittal in the case of trials of alleged terrorists. After all, the possibility of the innocence of at least some persons brought before such a tribunal cannot be excluded.

4. This is the official abbreviated title for the Tribunal. See U.N. Press Release, No. IT/13, Nov. 30, 1993, and No. IT/30, Feb. 11, 1994. The full title of the ICTY is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. For the Security Council resolution establishing the ICTY, see U.N. SCOR, U.N. Doc. S/RES/827 (1993).

5. The full title of the ICTR is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994. For the Security Council resolution establishing the ICTR, see S. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994).

6. The Statute for the International Criminal Court was drafted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [hereinafter, "U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC"] held in Rome, Italy (1998). See *Statute of the International Criminal Court*, U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC, U.N. Doc. A/CONF.183/9 (1998).

against humanity.⁷ I will consider the former to represent the international legalist tradition, and the latter a politico-military approach.

7. By "Kosovo war" I am referring to the eleven-week bombing campaign conducted by NATO against the Federal Republic of Yugoslavia, beginning on March 24, 1999. This campaign was designated "Operation Allied Force" and had many unique features worth bearing in mind. Most importantly, the Kosovo war may represent a precedent for expanding the international legal basis for the use of force. As at least one international legal scholar has noted, Operation Allied Force represented "the first time a major use of destructive armed force had been undertaken with the stated purpose of implementing UN Security Council resolutions but without Security Council authorization." Adam Roberts, *NATO's 'Humanitarian War' Over Kosovo*, 41(3) SURVIVAL 102, 102 (1999).

In this sense, this is a more pertinent example than the common references to the Pearl Harbor attack as the relevant precedent for a military response. Where the Pearl Harbor attack had all of the features of a conventional form of state aggression (on the part of Japan) giving rise to a straightforward right of self-defense on the part of the victim of that aggression (the U.S.). The bombing campaign against Afghanistan by Anglo-American forces—initially dubbed 'Operation Infinite Justice,' but later renamed 'Operation Enduring Freedom'—which began on October 7, 2001, resembles the Kosovo campaign in that it does not enjoy direct Security Council authorization, though two resolutions in September express the United Nations's support for efforts to combat terrorism.

In the case of the air campaign against Afghanistan, the American representative to the United Nations, Ambassador John Negroponte, presented a letter to the Security Council on October 8, 2001 stating that the attacks against Afghanistan were acts of self-defense under Article 51 of the Charter of the United Nations. See Christopher Wren, *U.S. Advises U.N. Council More Strikes Could Come*, N.Y. TIMES, Oct. 9, 2001, at B5. Absent evidence establishing state sponsorship on the part of Afghanistan of the attacks of September 11th, this invocation of the right of self-defense reflects an expansive interpretation of the Article 51. In particular, while Article 51 recognizes an "inherent right of individual or collective self-defence [sic] if an armed attack occurs against a Member of the United Nations" it has not previously been interpreted to permit uses of force against a state not held directly responsible for the attack in question. See U.N. CHARTER art. 51.

Thus the question arises whether the right of self-defense extends to attacks on states on whose territory non-state actors believed to be responsible for an armed attack may be present. Some international jurists have argued that the unprecedented nature of the September 11th attacks combined with the apparent absence of a direct state-sponsor require a broadening of the United Nation Charter's authorization of the use of force to cover actions like Operation Enduring Freedom, and future uses of military force to attack terrorists wherever they may be located. See, e.g., Richard Falk, *Falk Replies*, THE NATION, Nov. 26, 2001, at 2. Such a broadened definition of the justified use of force would only be necessary if it could be established that the nature of the threat is of a continuous, military onslaught by an organization or network with access to military technologies.

What the attacks of September 11th have so far proved is the ability of non-state actors to hijack civilian technologies and use them in acts of political violence. Hijacking itself is not, of course, a new phenomenon, and it is a phenomenon that has been defined in the past as an instance of transnational crime, which has largely been deterred or prevented through national security precautions and international coordination. Whether hijacking coupled with the use of the hijacked planes to attack civilian or military targets transforms the criminal act into an act of war depends on a definitional question requiring the adaptation of existing definitions to these circumstances, as there is no clear precedent. The September 11th attacks constitute a blurring of the line between criminal acts and acts of war in a way that challenges pre-existing international legal categorizations, and accordingly challenges international lawyers to fashion

The international legal community has been somewhat disabled in formulating an adequate account of what a response in the first tradition might be. On September 11th, it would seem, from this perspective, that we reached the limits of international law. Events overtook theory and as the military attacks on Afghanistan began, consideration of international legal mechanisms became moot. Despite the apparent current pessimism regarding the adequacy of legal mechanisms, considerable resources are available in the international legal arsenal to formulate an adequate non-military response. Further, military action may have unfortunate international legal consequences, establishing new norms with problematic implications and undermining the perceived legitimacy behind subsequent efforts at a legalist response in the wake of a military campaign.

The attacks of September 11th were widely seen by media commentators and international legal scholars alike as demonstrating a series of deficiencies in international law. These include, but are not limited to:

- the absence of a comprehensive international legal framework to address terrorism;
- the absence of adequate international criminal law infrastructure to address massive crimes against humanity and/or acts of war, particularly by non-state actors;
- the absence of sufficient international legal mechanisms for regulating, monitoring, prosecuting, and punishing non-state actors; and
- the absence of international policing capacities and adequate cooperative arrangements to undertake intelligence gathering and crime prevention at the international or multilateral level.

The response of the international legal community to these deficiencies in the immediate aftermath of September 11th has been a woeful retreat from the earlier trend of increasing the range of issues brought within the purview of international law.⁸

new categories, drawing by analogy on our existing taxonomy. The debate, then, should not be whether the attacks were criminal or military in nature, but rather whether the international response should draw more heavily on existing resources for international crime prevention or for authorizing uses of force. I will come to this question below.

8. This retreat reflects the view, supported by the deficiencies listed above, that the severity of the threat posed by international terrorism dooms the legalist paradigm to irrelevance. *See, e.g.*, Falk, *supra* note 7. However, many facets of the present multilateral efforts, beyond the military campaign against Afghanistan, reflect a tacit reliance on the legalist paradigm, in the form of international cooperation in intelligence-gathering, policing, law enforcement, and the prosecution of suspected terrorists. *See, e.g.*, Elisabeth Bumiller, *Spain to Study U.S. Requests to Extradite Terror Suspects*, N.Y. TIMES, Nov. 29, 2001, at B4. The question remains whether

Yet avenues of response to the challenge of terrorist crimes against humanity had already been proposed and developed during the 1990s by the Sixth (or Legal) Committee of the United Nations General Assembly ("Legal Committee") to suggest an international legal framework within which to conceptualize international responses to the present challenge. These proposals developed in conjunction with the push to establish a statute for an international criminal court. Even as the ICC statute was being formulated in Rome in 1998,⁹ in New York the General Assembly ("UNGA") commissioned an *ad hoc* committee on international terrorism to begin drafting a new comprehensive convention on international terrorism. The declared goal of the UNGA and its Legal Committee was to convene a high-level conference in the year 2000 under United Nations auspices to "formulate a joint, organized response of the international community to terrorism in all its forms and manifestations."¹⁰ It is perhaps useful to note that this language would not sound out of place in describing the goals of the United States in its efforts to form a multilateral coalition to wage the "war on terrorism."¹¹

The UNGA approach of 1996 onward was well suited to the nature of the threat posed by international terrorist activities; transnational threats require the development of a framework for coordinated international effort. But there are two further questions to consider. First, in light of these efforts, what international legal mechanisms are available to cope with an attack on the scale of what was witnessed on September 11th? Second, why are such mechanisms preferable to the *ad hoc* military

these approaches, rather than short-term military strategy, are not the more likely to characterize the battle against international terrorism in the long run, and if so, whether an acceleration in the development of international law in these areas, coupled with the use of existing international organizations (like the United Nations) to coordinate present efforts does not represent a viable and highly relevant legalist paradigm in addressing the terrorist threat.

9. See *supra* note 6.

10. U.N. Doc. GA/L/3103.

11. Several commentators have noted the parallel between the metaphor of war in the struggle against terrorism and the deployment of the same metaphor in American policies to counter international narcotics trafficking. See, e.g., Tim Golden, *A War on Terror Meets a War on Drugs*, N.Y. TIMES, Nov. 25, 2001, § 4 (Week in Review), at 4. The limitations of the metaphor in invoking the most effective mechanisms for preventing international narcotics trafficking may be instructive in considering the prospects for success of a military effort to curb terrorism. In particular, if the organization or network in question does not operate primarily from a single territorial base, then the benefits of destroying particular physical infrastructure (which in the case of a state is often devastating to its capacity to continue to pose a threat) may have little consequence in the long-term. The problem, in dealing with transnational threats is precisely fashioning responses that are not territorially specific, and that address the sources that sustain the threat, which in the case of terrorism, as with narcotics trafficking, may have little to do with physical location.

approach now being undertaken? Let us come at this in reverse order, and ask first what the politico-military approach has been.

The strategies in this approach have ranged from measured to hysterical, but have largely revolved around dividing states between those that join in an international coalition against terrorism and those that sponsor terrorism.¹² The former are admitted into a loose military and diplomatic alliance, while the latter are targeted for military and diplomatic attack. The specific strategy of the military attack, at least in the early stages against Afghanistan, was an attempt to target areas where physical infrastructure associated with terrorist organizations or networks may have been located. The absence of substantial terrorist infrastructure, coupled with a frustration with the regime in power in Afghanistan, quickly led to an expansion of the military strategy to the toppling of that regime and support to a rival faction on the ground. In the process, collateral damage with respect to civilian targets occurred and there may have been substantial violations of the laws of war.¹³ The expansion of the aims of the military campaign, the strategy of dividing nations between those that support the coalition and those that support terrorism, and the absence of

12. This strategy has been developed primarily by the Bush administration in the United States and the government of Prime Minister Tony Blair in the United Kingdom. See, e.g., Elisabeth Bumiller, *Prepare for Casualties, Bush Says, While Asking Support of Nation*, N.Y. TIMES, Sept. 20, 2001, at A1 (noting that President Bush "posed a stark choice to other nations. 'Every nation, in every region, now has a decision to make,' he said. 'Either you are with us, or you are with the terrorists.'"); Nicholas Blatt and Suzanne Goldenberg, *Blair Delivers the Final Warning: Tough New Rhetoric May Signal Strike at Regime Within Week*, THE GUARDIAN (LONDON), Sept. 26, 2001, at 1. The Bush-Blair military campaign is not, of course, the only means by which a politico-military strategy for dealing with the threat of terrorism might be formulated. However, it is instructive that the approach they adopted required identifying state entities that might be the legitimate target of a use of force, although no allegations of state-sponsorship of the actual attacks of September 11th were ever issued. Accordingly, the impulse to divide the international system between those that will join a coalition against terrorism and those that will be targeted by it is a politically expedient policy for distinguishing appropriate targets of attack. The absence of a connection between the states that are potential targets of the military campaign and direct responsibility for the attacks is an indication of the poor fit between the military strategy and the atrocity it is intended to address.

13. See, e.g., Nicholas Watt, Richard Gordon-Taylor, and Luke Harding, *Allies Justify Mass Killing*, THE GUARDIAN (LONDON), Nov. 29, 2001, at 1 (noting that "Britain and the United States were facing growing international pressure . . . to explain their role in the deaths of up to 400 Taliban prisoners who were killed by United States warplanes and Northern Alliance fighters at a fortress outside the northern Afghan town of Mazar-i-Sharif"). Whether the circumstances surrounding this massacre rise to the level of a violation of the Third Geneva Convention is unclear, but other aspects of military policy have also raised concerns. See, e.g., Dexter Filkins and Carlotta Gall, *Foreign Militants Seek Safe Passage From Afghan City*, N.Y. TIMES, Nov. 22, 2001, at A1 (noting that United States Secretary of Defense Donald Rumsfeld "was firmly opposed to any agreement to evacuating the foreigners" from the besieged city of Kunduz).

any clear allegation that the state(s) targeted by the military campaign bear direct responsibility for the September 11th attacks are all sources of serious concern.

More generally, the politico-military response glosses over a number of obvious difficulties, such as defining terrorism, determining how to address different forms of terrorism (ranging from state-terrorism to terrorism by transnational non-state actors that may or may not have state sponsorship to terrorism by domestic groups with no international ambitions), and developing an internationally coordinated strategy that includes policing capabilities, intelligence gathering and sharing arrangements, and enforcement mechanisms. Arrangements involving sufficient international cooperation to develop effective intelligence sharing and policing capacities have proven historically to involve enormous obstacles, which is part of the reason that a legal framework on terrorism has been slow in developing, as have frameworks on international narcotics trafficking. I would argue that the only means of assuring long-term multilateral cooperation in these areas is through an agreed, legally binding framework.

One short-cut around developing complex mechanisms to cope with the surveillance, policing, and enforcement capacities required to combat non-state terrorism currently being tested is to develop criteria whereby individual states may be penalized through existing international mechanisms, thereby generating state-level incentives to do the dirty-work of prevention, prosecution, and/or punishment. By attributing responsibility to putative state sponsors, international pressure might be brought to bear on individual states to undertake the massive intelligence gathering, policing, and enforcement measures necessary to combat terrorism. Thus, states that are known to have terrorist bases within their borders, or states that appear to be involved in the financing of terrorist networks, would bear the costs of international prevention efforts. While this alternative seems attractive at first, and certainly underlies current efforts to identify states that "harbor" terrorists, absent a coherent and comprehensive legal framework this approach encounters difficulties. First, if physical location (*i.e.*, provision of a "harbor") is a basis for guilt-by-association then presumably one should attribute culpability as much to Hamburg, London, and parts of Florida, Maryland, and New Jersey, not to mention Riyadh and Dubai, as to Kandahar. Second, if facilitating the financing of terrorist networks is a basis for guilt then, again, it would appear that several major Western banking groups would have to face as much international scrutiny and pressure as Pakistan or Saudi Arabia. What this shows is not that we should bomb Germany or dismantle major

banking groups, but that the definitions being used are overly broad or unsound and require precision and systematization.

Bypassing these difficulties by invocation of an us-and-them strategy that divides the world between the coalition against terrorism and those that allegedly sponsor terrorism is unhelpful. So long as sponsorship of the IRA in Northern Ireland or ETA in the Basque region of Spain or the FARC in Colombia is not at issue, the question is not a division between those that do and do not sponsor terrorism, but rather a division between different forms of terrorism, with different goals and different tactics. Efforts to draw a sharp line between those that oppose and those that support terrorism also run certain risks, not least because the civilizational overtones of these efforts confirm the worldview of the very terrorist groups that the coalition is seeking to combat. In light of the potential disadvantages of the military approach, let us now turn to an account of the alternative legal mechanisms available for managing the threat of international terrorism.¹⁴

III. EXTENDING THE BOUNDARIES OF INTERNATIONAL LAW

Well in advance of September 11th, international jurists had begun to undertake the monumental task of extending the boundaries of international law to develop mechanisms to deal with transnational criminal actors, whether terrorists, mafia, or international traffickers of illegal materials. Viewed widely as the underside of globalization, the transnationalization of crime and the trade in commodities previously regulated exclusively by states (including precious minerals, drugs, and weapons of mass destruction) requires a coordinated international legal response, involving international policing capacities, intelligence-gathering, and prevention work, as well as development of international criminal law to prosecute

14. I should note at the outset, however, that there are a series of legal mechanisms that are relevant to the current crisis—especially now that it has entered the phase of actual military action against a state—that are beyond the scope of this essay, though they are highly relevant. These are the laws of war, both *jus ad bello* and more importantly *jus in bello*. Clearly, to the extent that a politico-military approach is adopted, any use of force must be governed by the laws of war—including the requirements of the Geneva Conventions and the Hague Regulations—beginning with the principles of necessity, proportionality, and discrimination between combatants and non-combatants. Convention Respecting the Laws and Customs of War on Land, with annex of regulations, October 18, 1907, 36 Stat. 2277 (Hague Convention); Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (First Geneva Convention); Convention for the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Second Geneva Convention); Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Third Geneva Convention); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Fourth Geneva Convention).

those accused of undertaking such crime. In the face of these realities, the UNGA began efforts in earnest to draft a comprehensive convention against international terrorism by the mid-1990s, parallel to the efforts to draft a statute for a permanent international criminal court.

The first draft that emerged from these efforts was the draft International Convention for the Suppression of the Financing of Terrorism, which was opened for signature in January 2000, in the hopes of having enough state signatories to have it take effect by December 31, 2001.¹⁵ The convention would make it an international crime for any person to intentionally and unlawfully finance the commission of an act that constitutes a terrorist offense. Terrorist offenses, in turn, were defined not only within the convention, but also in relation to definitions in nine other terrorism related treaties already in effect, ranging from the criminalization of attacks on civil aviation to prohibitions on bombings. These treaties already provide a basis for prosecution of the terrorists behind the September 11th attacks.¹⁶

Although the UNGA goal of convening an international conference on terrorism has not yet been accomplished, the impetus to convene such a conference is clearly present today. The creation of an *ad hoc* criminal tribunal for September 11th with a statute providing a definition of terrorism would also be an important step toward developing a comprehensive international legal framework on terrorism.

While the favored metaphor for conceiving the September 11th attacks has been that of "war" or a "military" act, the attacks challenge our categories for conceptualizing the distinction between criminal acts and acts of war. Nonetheless, understanding the attacks by analogy to crimes against humanity is more constructive than the current efforts to cast the attacks, and the response to them, militarily. Understood in terms of

15. This Convention was adopted by the General Assembly on December 9, 1999, G.A. Res. 54/109, U.N. GAOR 6th Comm., 54th Sess., U.N. Docs. A/54/607-16 (1999).

16. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975; International Convention against the Taking of Hostages Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Materials, with annex, Oct. 26, 1979, T.I.A.S. No. 11,080; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of Sept. 23, 1971, Feb. 24, 1988, Senate Treaty Document No. 100-19; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, with protocol, Mar. 10, 1988, Senate Treaty Document No. 101-1; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249.

crimes against humanity, the attacks immediately invoke a series of innovative international legal remedies that we have grown accustomed to contemplating in the last decade, including: the application of principles of universal jurisdiction; the convening of *ad hoc* criminal tribunals; the invocation of United Nations Security Council collective security powers; and other comparable measures. These remedies have had a mixed record of success over the course of the last decade, but they have been refined and could be adapted to fashion an effective response in the aftermath of the September 11th attacks.¹⁷

In concluding my remarks, let me identify three constructive approaches for making use of the spectrum of relevant international law and suggesting productive directions for legal developments that could contribute to restoring international security in the wake of September 11th.

First, I would advocate the immediate adoption of the United Nations General Assembly proposal to convene an international conference to draft a comprehensive international convention on terrorism, based on the UNGA Legal Committee's preliminary works.¹⁸ Such a conference would produce a working framework to coordinate international policing and intelligence-gathering efforts that would greatly accelerate the process already underway to identify perpetrators, their methods and their organizational structure so as to prevent future attacks.

Second, I would propose the convening of an *ad hoc* criminal tribunal (similar to the ICTY and the ICTR)¹⁹ for the terrorist attacks on New York and Washington, DC. The statute of such a tribunal could establish important precedents, including:

- upholding a principle already being developed by the ICTR, namely the extension of the definition of a crime against humanity in customary international law to include crimes perpetrated by non-state actors;

17. At least one scholar has observed that it has always been in the wake of terrorist acts that gaps in the existing international legal frameworks have been identified and have stimulated negotiations. See, e.g., David Freestone, *The 1988 International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 3 INT'L J. ESTUARINE & COASTAL L. 305, 305-06 (1988). The same can, of course, be said for military strategy, which is also currently being adapted to suit the purposes of a war against actors that have neither effective control over a territory nor a regular army at their disposal.

18. See *supra* notes 6, 10, and 14, and accompanying text.

19. See *supra* notes 4, 5, and 6. It should be noted that such a tribunal need not remain in existence once the permanent International Criminal Court is established.

- providing a definition of international terrorism, with a proper carve-out for national resistance movements,²⁰ and including a criminal theory of conspiracy analogous to the one developed at Nuremberg; and
- reinforcing the criminalization of the trade in controlled substances or illegal materials, especially where used to finance terrorist activities (a provision might be developed that would include all black-market activities for such financing, encompassing the trade in precious commodities like diamonds as well).

Of the mechanisms I would mention here, the final one is the extension of the United Nations Security Council's peace and security mandate to include threats to international peace and security emanating from international terrorism and other actions by non-state actors or transnational actors. The precedents set by Security Council resolutions 1368 (2001)²¹ and 1373 (2001)²² move precisely in this direction and, particularly in the case of Resolution 1373, go a considerable distance in defining an international legal agenda for preventing and punishing terrorism. Specifically, 1373 envisions action under Chapter VII²³ of the United Nations Charter to:

- prevent and suppress the financing of terrorist acts;
- criminalize all forms of state support to terrorist entities and persons and assign serious criminal penalties proportionate to the crimes;

20. An abiding difficulty in international efforts to establish a comprehensive framework on terrorism have been definitional debates, largely centered on drawing a distinction between a "legitimate struggle for self-determination" and terrorism. See, e.g., *Press Release: Consensus Eludes Legal Committee in Final Act of Session As It Recommends Blanket Condemnation of Terrorism—Abstaining States Decry Failure to Distinguish Legitimate Struggle for Self-determination from Terrorism*, U.N. GAOR 6th Comm., 54th Sess., U.N. Doc. GA/L/3140 (1999). The current international effort to combat terrorism has drawn a clear division between non-state actors using political violence to advance self-determination claims (ETA in Spain or the IRA in Ireland) and the terrorist organizations with a global dimension targeted by the coalition against terrorism. In this light, it would appear that there is a *de facto* agreement to the distinction between terrorist groups and groups exercising either a national right of self-determination or of self-defense (depending on the perspective adopted). The proposed tribunal might build on this pragmatic consensus to develop a working definition of terrorism that would command broad international support.

21. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

22. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1371 (2001).

23. U.N. CHARTER ch. 7, arts. 39-51 (entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression").

- facilitate cooperation in intelligence-gathering, investigation, and prevention, and the exchange of operational information between states to track the movement of terrorist networks;
- address the links between international terrorism and transnational crime, illicit drugs, money-laundering, illegal arms-trafficking and illegal movements of weapons of mass destruction; and
- encourage all states to become parties to the relevant international conventions for the prevention of terrorism in order to develop coordinated mechanisms of prevention and punishment.

The claim that the attacks of September 11th transcend the capacities of the United Nations, and international law more generally, suggests that neither the organization nor the law is equipped to deal with crime by transnational or non-state entities. However, it remains an undeniable fact of international life that the system is organized around states as basic units and that even terrorist networks have to operate in a system of state boundaries. In such a system, any response to terrorism will also be organized around states, whether it be legal or not. International law and international organizations enjoy the distinct comparative advantage of being designed to facilitate inter-state interaction and coordination, an advantage with which military strategy can scarcely compete when faced with an enemy that is not organized militarily but through transnational coordination.

The insight shared by those who adopt a legalist paradigm in response to terrorism is that there can be no *ad hoc* or unilateral solution to terrorism. Nor in the long run can there be a military solution. Terrorism as it emerged on September 11th is a transnational phenomenon that requires a concerted, consistent and coordinated international cooperative framework if there is to be any chance of eliminating the threat. The only viable mechanisms available for accomplishing integration and coordination of strategy are those of international law and organization. Efforts to short-cut the development of an international legal framework to cope with terrorism, in favor of military coalitions and a binary division of states between good and evil, though possibly more satisfying to some in the short-term, run the risk of aggravating the very international divisions that can most easily be exploited to coordinate further underground criminal and terrorist enterprise. Entrenching an us-and-them paradigm is in tension with the need for coordination—it is both unlikely to yield vital information in the short-run and less likely to yield international security in the long run. A preferable alternative is to employ the resources already in place within the boundaries of existing international law, and to pursue constructive proposals on how to shift those boundaries outward. These efforts, more than any military campaign, hold the long-term promise of a more secure international system.

SANCTIONS AGAINST NON-STATE ACTORS FOR VIOLATIONS OF INTERNATIONAL LAW

Jordan J. Paust

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I. INTRODUCTION

Numerous forms of non-state actor conduct in violation of treaty-based and customary international law have been subject to criminal and civil sanctions in various international and domestic fora for centuries. Within United States domestic legal processes, early types of non-state actor violations included, among others, piracy, war crimes, the counterfeiting of foreign currency, violation of passports, the slave trade, breaches of neutrality, violations of territorial rights, other acts of hostility, violence against foreign officials, general trespasses against the law of nations, conduct of poisoners and assassins, and violations of human rights.² Thus, statements that private actor liability did not begin until the twentieth century or that private actor liability with respect to human rights did not begin until after World War II would be in serious error. More recently, the landmark case of *Kadic v. Karadzic*³ provides continued recognition of private actor liability for, among others, piracy, slave trade, passport violations, breaches of neutrality, hijacking of aircraft, crimes against humanity, genocide, and war crimes.⁴ The United States Executive

1. Law Foundation Professor, University of Houston. Director of the International Law Institute, Houston Law Center. These remarks were presented at the International Law Association ILA Weekend, October 2001, New York, New York, United States.

2. See, e.g., *United States v. Hawn*, 26 F. Cas. 227, 231 (C.C.S.D. Ala. 1860) (No. 15,329) (Campbell, J., on circuit) (private human rights duties); JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 8, 15-17, 23-24, 120-32 *passim* (2000); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7-8, 34 n.38, 48-49 ns.60-80, 50 n.88, 182, 201-03, 205, 264-70, 274-76, 289-91 *passim* (1996).

3. 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

4. See *id.* at 236, 239-43(2d Cir. 1995).

branch has also recognized on numerous occasions that private actors, including private companies, can violate international law, including human rights law, especially when non-state actors have been prosecuted by the government for violations of international law.⁵

II. PROSECUTION OF AND LAWSUITS AGAINST BIN LADEN *ET AL.*

In view of such trends and recognitions, it should not be surprising that Mr. bin Laden and his entourage, if reasonably accused, as well as the companies or corporations they control or that are complicit in their illegal schemes, as private actors, are subject to criminal and civil sanctions in the United States for violations of international law. For example, if captured,⁶ prosecution of Mr. bin Laden and others acting outside the United States in connection with the September 11th terroristic attack on the United States and on United States nationals is possible under the United States Antiterrorism Act.⁷ Section 2332(a) of the Act is not applicable to homicide as such arising from the attacks because although the section applies to "Whoever kills a national of the United States" it adds the limiting phrase "while such national is outside the United States." Yet, such language would cover prosecution of homicide against United States nationals abroad in the case of the bombings of United States

5. See, e.g., *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) ("both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist organizations in federal court"—there, liability for unlawful killing); *Hahn*, 26 F. Cas. at 231 (President Jefferson's recognition in an address to Congress of "violations of human rights" by private "citizens of the United States"); 26 Op. Att'y Gen. 250, 252-53 (1907) (U.S. dredging company is liable for harm caused by dredging activity); 1 Op. Att'y Gen. 68, 69 (1797); 1 Op. Att'y Gen. 61, 62 (1796); 1 Op. Att'y Gen. 57, 58 (1795); Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 617-18 (also quoting Memorandum for the United States as Amicus Curiae in *Filartiga v. Pena-Irala*, 630 F.2d 876 at 621 (human rights under international law "'directly create rights and duties of private individuals . . . ' do create such rights and duties," (quoting the "highly respected" Constitutional Court of Germany)), 623-24 n.502 (quoting President Washington and E. McDOWELL, DIGEST OF UNITED STATES PRACTICE, *supra*, at 171), 630-31 (1989), revised in PAUST, *supra* note 1, at 199-201, 204-05, 269 n.504.

6. I assume that capture of Mr. bin Laden or others in Afghanistan would be permissible under international law either as lawful acts undertaken during a process of self-defense under Article 51 of the U.N. Charter or as lawful acts undertaken during a U.N. Security Council authorized use of armed force under S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001), which reaffirmed "the need to combat by all means... threats to international peace and security caused by terrorist acts," *id.* at pmb., and called upon all states "to prevent terrorist attacks and take action against perpetrators of such acts," *id.* at ¶ 3(c)). Concurring in the general propriety of arrests in foreign states in such circumstances, see, e.g., PAUST, *ET AL.*, *supra* note 2, at 479.

7. 18 U.S.C. § 2331 *et seq.*

Embassies in Kenya and Tanzania and the attack on the U.S.S. Cole. Section 2332 (b) does not contain the limiting phrase noted above regarding the location of United States victims and can cover attempts and conspiracy in connection with the killing of a national of the United States (apparently anywhere) although the accused must be “outside the United States” at the time of the attempt or the engagement in a conspiracy to kill. Section 2332(c) should also be applicable, since it reaches an accused “outside the United States” who “engages in physical violence—(1) with intent to cause serious bodily injury to a national of the United States; or (2) with the result that serious bodily injury is caused to a national of the United States.” Section 2332(d) requires written certification by the United States Attorney General “or the highest ranking subordinate” that offenses under Section 2332 were “intended to coerce, intimidate, or retaliate against a government or a civilian population”—a certification that would be relatively easy to make.

Section 2332(b) applies to “acts of terrorism transcending national boundaries” and can form the basis for prosecution, for example, of any person who kills, maims, or assaults (if the latter results in serious bodily injury) any person within the United States or “creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure . . . or other real or personal property within the United States . . .” if such involves “conduct transcending national boundaries” and one of the circumstances listed in subsection (b) is present. Relevant circumstances in subsection (b) could include:

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

(C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;

(D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States.

The listed circumstances would be met if Mr. bin Laden used any facility of foreign commerce to plan, finance, order, or carry out the September 11th attack; if the targeting of the World Trade Center affected interstate or foreign commerce; if the United States Government and Pentagon personnel were victims; and/or if the Pentagon was targeted.

Prosecution of non-state and state actors is also possible under United

States legislation implementing the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation⁸ (which in Article 7 thereof also requires all signatories to bring into custody those reasonably accused of international crimes covered by the treaty and either to initiate prosecution of or to extradite such persons, without any exception or limitation of such duty whatsoever). 18 U.S.C. § 32(a) should be applicable to “[w]hoever willfully—(1) . . . destroys, disables, or wrecks, any aircraft in the special aircraft jurisdiction of the United States” and to whoever “(5) performs an act of violence against or incapacitates any individual on any such aircraft . . .” and such persons should include any co-conspirators who were involved in the willful destruction of United States commercial aircraft flying within United States airspace.

Since international terrorism⁹ and crimes against humanity¹⁰ are international crimes over which there is universal jurisdiction and a universal responsibility either to initiate prosecution of or to extradite those reasonably accused,¹¹ the United States should also be able to enact new legislation that operates retroactively for prosecution of what were already recognizable international crimes under customary international law, and such legislation should not be challengeable under prohibitions of ex post facto laws. The permissibility of such retroactive legislation was affirmed, for example, in the *Eichmann* case in Israel¹² (also addressing similar rulings in the Netherlands and Germany); in the United States extradition decision in *Demjanjuk v. Petrovsky*;¹³ and by the Executive officials applying the 1863 Lieber Code to acts that were already war crimes under customary international law.¹⁴ Certain persons accused of international crimes before the International Military Tribunals at Nuremberg and for the Far East made claims that Charters of the Tribunals incorporating such crimes were violative of ex post facto or *nullum crimen sine lege* precepts,

8. Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 21, 1971, 974 U.N.T.S. 177 [hereinafter Montreal Convention].

9. See, e.g., S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001); S.C. Res. 579, U.N. SCOR, 2637th mtg., U.N. Doc. S/RES/579 (1985); G.A. Res. 40/61, U.N. GAOR, 108th mtg., Supp. No. 53 at 301, U.N. Doc. A/RES/40/61 (1986); JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 995, 1005, 1007 (2d ed. 2000).

10. See, e.g., PAUST ET AL., *supra* note 9, at 855-916.

11. See, e.g., *id.* at 9, 16-17, 132-35, 140-41.

12. Attorney General of Israel v. Eichmann, *reprinted in* PAUST ET AL., *supra* note 2, at 455.

13. 776 F.2d 571 (6th Cir. 1985).

14. See, e.g., DIGEST OF OPS. OF JAG, ARMY 244 (1866); PAUST ET AL., *supra* note 9, at 244-48.

but the Tribunals correctly ruled that the crimes existed under international law at the time of their commission and that no such precepts were violated.¹⁵ Similarly, a new International Criminal Tribunal could be created by Executive Agreement to prosecute international crimes arising out of the September 11th attack.

Civil lawsuits are also possible against non-state persons or corporations under the Antiterrorism Act, assuming that Mr. bin Laden or other persons outside the United States are captured and brought to the United States and process has been served. Section 2333 allows civil remedies in a lawsuit brought by “[a]ny national of the United States injured in his or her person, property, or business, by reason of an act of international terrorism, or his or her estate, survivors, or heirs . . . and [such plaintiff] shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.” The main problem after winning such a lawsuit will involve execution of a judgment on any properties of the defendants located within the United States (no real problem) or execution abroad (at the discretion of some foreign court). Perhaps bank accounts of Mr. bin Laden, his entourage, and companies involved in terrorism could be frozen not merely for purposes of preventing the financing of terrorism, but also for recompense and other types of damages for victims.

Foreign plaintiffs can also sue non-state persons or corporations under the Alien Tort Claims Act (ATCA)¹⁶ for any wrong in violation of customary international law and/or treaties of the United States, such as the International Covenant on Civil and Political Rights¹⁷ or the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.¹⁸ Punitive damages are recoverable in such lawsuits. Under the ATCA, plaintiffs could sue any companies or corporations complicit in relevant violations of international law, *e.g.*, companies or corporations used to finance terroristic attacks in violation of human rights. Whether lawsuits by United States or foreign plaintiffs are possible under the Torture Victim Protection Act (TVPA)¹⁹ depends on interpretation of phrases such as “extrajudicial killing” and on whether Mr. bin Laden and

15. See, *e.g.*, PAUST ET AL., *supra* note 9, at 625, 628-29.

16. 28 U.S.C. § 1350.

17. International Covenant on Civil and Political Rights, Dec. 9, 1966, art. 6, 7, 9, 974 U.N.T.S. 171 (in particular, plaintiffs should stress violations of the right to life (art. 6), cruel and inhumane treatment (art. 7), and liberty and security of person (art. 9). Concerning human rights duties of non-state actors, see, *e.g.* *supra* note 1 and *infra* notes 26-31, 33-40.).

18. Montreal Convention, *supra* note 8.

19. Torture Victim Protection Act of 1992, Pub. L. No. 102-256, 106 Stat. 73 1992.

his entourage were acting “under actual or apparent authority, or color of law, of any foreign nation” (such as Iraq or Afghanistan). Of course, Mr. bin Laden is not a leader of any foreign nation, state, belligerency, or insurgency within the meaning of international law and is merely a private actor. However, under certain circumstances, private actors can be acting under actual or “apparent authority” or “color” within the meaning of the TVPA.²⁰ Appropriate tests recognized in *Kadic* include inquiry whether the non-state actor acts “together with” a state, “in concert with” a state, or with “significant state aid”;²¹ and tests recognized in *Iwanowa v. Ford Motor Company*²² include whether the non-state actor acts “in close cooperation with” or has “worked closely with” a state.²³

If relevant acts were committed by Mr. bin Laden and his entourage without direct participation in any armed conflict, the acts would not be war crimes. However, if they were committed in direct connection with an armed conflict—*e.g.*, as an extension of the armed conflict between Iraq and the United States and other countries in the ongoing Gulf War or as an extension out of the insurgency that was occurring prior to September 11th in Afghanistan between the Taliban and the Northern Alliance—prosecution is possible under 10 U.S.C. §§ 818 and 821, as supplemented for purposes of jurisdiction in the federal courts by 18 U.S.C. § 3231,²⁴ whether or not other war crimes legislation is available alternatively. When “grave breaches” of the 1949 Geneva Conventions (including “willful killing, willfully causing great suffering or serious injury to body or health . . .” to persons protected by the Conventions) have been committed by any person “inside or outside the United States” against a United States national, the War Crimes Act of 1996 is operative.²⁵

Mr. bin Laden and others are also under indictment for various other crimes in connection with the first bombing of the World Trade Center, including conspiracy to murder United States nationals, to use weapons of mass destruction against United States nationals, to destroy United States buildings and property, and to destroy United States defense utilities.²⁶

20. See, *e.g.*, *Kadic v. Karadzic*, 70 F.3d at 244-45.

21. *Id.* at 245.

22. 67 F. Supp.2d 424 (D.N.J. 1999).

23. *Id.* at 445-46 and n.27.

24. See, *e.g.*, PAUST ET. AL., *supra* note 9, at 243-44, 253-59; Jordan J. Paust, *The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971).

25. See generally 18 U.S.C. § 2401 (1996).

26. See *United States v. Usama bin Laden, et al.*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

III. PRIVATE RESPONSIBILITY OF COMPANIES AND CORPORATIONS MORE GENERALLY

With respect to corporate liability for violations of international law, it should be noted that a private company or corporation as such is simply a juridic person and has no immunity under domestic United States or international law. In each nation-state, private corporations, like private individuals, are bound by domestic laws.²⁷ Similarly, private corporations and entities are bound by international laws applicable to individuals. For example, in the United States and elsewhere, companies and other non-state associations and organizations have been found to have civil and criminal responsibility for various violations of international law, including human rights and related international proscriptions.²⁸ Further, the

27. This widespread pattern of legal responsibility and nonimmunity of private corporations under domestic law is itself a general principle of law relevant to international legal decisionmaking. Concerning the relevance of general principles of law, *see, e.g.*, Statute of the International Court of Justice, art. 38 (1) (c).

28. *See, e.g.*, cases *infra* notes 28-41; *Weisshaus v. Swiss Bankers Ass'n (in re Holocaust Victim Assets Litigation)*, 225 F.3d 191 (2d Cir. 2000) (participation of Swiss banks in war crimes, crimes against humanity, and genocide); *Linder v. Portocarrero*, 963 F.2d 332, 336-37 (11th Cir. 1992) (the Contras can be civilly liable for torture and unlawful killing); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (the PLO and various organizations can be civilly liable for murder); 739 F. Supp. 854, 858, 860 (S.D.N.Y. 1990); *In re Nazi Era Cases Against German Defendants Litigation*, 2000 U.S. Dist. Lexis No. 18148 (D.N.J. Dec. 5, 2000); *In re Holocaust Assets Litigation*, 105 F. Supp.2d 139 (E.D.N.Y. 2000); *In re Austrian and German Bank Holocaust Litigation*, 80 F. Supp.2d 164 (S.D.N.Y. 2000); *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998); PAUST ET AL., *supra* note 2, at 16, 106-107 (Japanese court found Japanese store liable for discrimination against foreigners in violation of the International Convention on Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195); PAUST ET AL., *supra* note 9, at 43-44, 617; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213, RN 7 (1987) ("Multinational enterprises have been under increasing scrutiny by international bodies"); 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 21, 104, 230 (M.C. Bassiouni ed. 1987); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. H.R. J. 51 (1992); Beth Stephens, *Human Rights Accountability: Congress, Federalism and International Law*, 6 ILSA J. INT'L & COMP. L. 277, 284-85 (2000) ("corporations can be held liable for human rights abuses when they are responsible for violations of international human rights norms that apply to private actors, or when they act in complicity with government officials to commit other human rights violations."). *See also In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000) (U.S. nationals' claims against Japanese corporations concerning slave labor of former prisoners of war in violation of the 1907 Hague Convention No. IV, 36 Stat. 2277, T.S. No. 539, and thus claims concerning war crimes, had been settled by a 1951 U.S.-Japan Treaty of Peace); Sean D. Murphy, *Contemporary Practice of the United States*, 95 AM. J. INT'L L. 139 (2001); MYRES S. MCDUGAL ET. AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 103-04 (1980) ("deprivations and nonfulfillment" of human rights values by corporations); 2 OPPENHEIM'S INTERNATIONAL LAW 211 n.3 (H. Lauterpacht ed., 7th ed. 1952) ("observance of fundamental human rights is not dependent upon the recognition of a specific status"); Charter of the International Military Tribunal at Nuremberg, arts. 9-10, Annex to the London Agreement (8 Aug. 1945), 82 U.N.T.S. 279 (discussing criminal groups and

propriety of lawsuits against companies and corporations under the ATCA for violations of international law has been recognized in several United States cases,²⁹ and liability can attach directly as a private actor, as an actor colored by a connection with a state or other public actor, or as a participant in a joint venture or complicitous relation with another violator. For example, in 1997 in *Doe v. UNOCAL Corp.*,³⁰ it was recognized that several human rights and other international law claims made by farmers from Burma against a private corporation and others were viable under the

organizations); Control Council Law No. 10, art. II (1) (d) (20 Dec. 1945), *reprinted in* PAUST ET AL., *INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT* 151, 152 (2000) (discussing criminal groups and organizations).

29. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 2001 U.S. Lexis 2488 (Mar. 26, 2001) (human rights claims re: imprisonment, torture, killing); *Bodner et al. v. Banque Paribas et al.*, 114 F. Supp.2d 117 (E.D.N.Y. 2000); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090-95 (S.D. Fla. 1997); *Doe v. UNOCAL Corp.*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997); *National Coalition Gov't of the Union of Burma v. UNOCAL, Inc.*, 176 F.R.D. 329, 348 (C.D. Cal. 1997) (private company utilizing slave labor may be subject to liability under the ATCA); 26 Op. Att'y Gen. 250, 251-53 (1907). *See also Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Nguyen da Yen v. Kissinger*, 528 F.2d 1194, 1201-02, n.13 (9th Cir. 1975) (private adoption agencies seemed to be joint tortfeasors under the ATCA, but there was no briefing on such and they were not joined in the complaint); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 445 (D.N.J. 1999); *Burger-Fisher v. Degussa AG*, 65 F. Supp.2d 248, 272-73 (D.N.J. 1999); *Bao Ge v. Li Peng*, 1999 U.S. Dist. Lexis 10834, at 6-7 (D.C. 1999); *Doe v. The Gap, Inc.*, No. CV99-717 (D. Haw.) (settled—see CALIFORNIA LAWYER 17 (Jan. 2000)); Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 B.Y.U. L. REV. 1139 (1999); Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act*, 40 VA. J. INT'L L. 545 (2000); Kevin M. McDonald, *Corporate Civil Liability Under the U.S. Alien Tort Claims Act for Violations of Customary International Law During the Third Reich*, 1997 ST. LOUIS-WARSAW TRANS'L L.J. 167 (1997); Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 347, n.37, 391-95 (1997); Kenneth C. Randall, *Further Inquiries Into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL'Y. 473, 501-03 (1986); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 W&M L. REV. 447, 521-22 (2000); Stephens, *supra* note 28, at 284-85.

Other ATCA cases and opinions addressing private actor duties under international law include the following: *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1, 607); *Jama v. I.N.S.*, 22 F. Supp.2d 353, 362-63 (D.N.J. 1998); *Doe I v. Islamic Salvation Front*, 993 F. Supp. at 8; *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. 1996); *Adra v. Clift*, 195 F. Supp. 857, 864 (D. Md. 1961); 26 Op. Att'y Gen. 250, 252-53 (1907); 1 Op. Att'y Gen. 57, 58 (1795). *See also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (Rehnquist, J.) ("The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after passage of the FSIA as before with respect to defendants other than foreign states."); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985) (Scalia, J., op.) ("Alien Tort Statute . . . may conceivably have been meant to cover only private, nongovernmental acts . . ."); *M'Grath v. Candaleiro*, 16 F. Cas. 128 (C.D. S.C. 1794) (No. 8,810) (dictum).

30. 963 F. Supp. 880 (C.D. Cal. 1997).

ATCA, including claims of slave or "forced" labor, torture, violence against women, and other human rights violations and crimes against humanity that also occurred in complicity with Burmese military, intelligence groups, and police.³¹ Addressing universal jurisdiction through the ATCA and nonimmunity of corporate actors for cruel, inhumane treatment and slave or forced labor, the district court in *Iwanowa v. Ford Motor Co.*³² added: "No logical reason exists for allowing private

31. *Id.* at 891-92. Later, the district court dismissed such claims, "finding no evidence that UNOCAL 'participated in or influenced' the military's unlawful conduct," and no evidence that UNOCAL conspired with the military, or that UNOCAL's conduct amounted to "participation or cooperation in the forced labor practices" beyond mere knowledge of and benefits from the unlawful military practices. 110 F. Supp.2d 1294, 1306-07, 1310. Compare *Kadic v. Karadzic*, 70 F.3d at 245 ("color of law" responsibility exists when a private actor acts "together with" or "in concert with" a state or "with significant state aid"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 445-46, n.27 (when defendant was "in close cooperation with" or had "worked closely with" a state).

Apparently the district court did not realize that various human rights prohibitions other than those relating to slavery or forced labor, genocide, other crimes against humanity, or war crimes can form the basis for private actor liability in the absence of conspiratorial state involvement, complicity with a state actor, or "color of law," and that United States tests for "color of law" or "state action" responsibility are not part of international law and are inappropriate and too limiting with respect to non-state actor liability for various other human rights violations. Compare 110 F. Supp.2d at 1304-05, 1307-08 (apparently unaware of judicial recognitions and opinions of Attorneys General not cited therein, the Executive's Amicus brief in *Filartiga v. Pena-Irala* (quoted *supra* note 5), and other recognitions of private actor liability noted herein).

The district court also seemed to be unaware of the full range of complicity standards under international law. Concerning standards regarding criminal complicity that can include both action and inaction amounting to participation, assistance, aiding, encouragement, reinforcement, or inducement (each with some minimally demonstrated criminal intent). See, e.g., PAUST ET AL., *supra* note 9, at 39-43. However, civil liability should pertain under a lower threshold than criminal intent, e.g., negligence or fault. See, e.g., PAUST ET AL., *supra* note 2, at 510-12 (addressing the Soering Case, 161 Eur. Ct. H.R. (Ser. A), ¶¶ 80-92 (1989) (conduct by one actor when such involves a foreseeable "real risk" of a human rights violation by another actor leads to an independent violation, an "associated" violation, or a form of complicitous violation of human rights)), 517 (addressing a similar decision in *Chahal v. United Kingdom*, Eur. Ct. H.R. (15 Nov. 1996)), 557, 561 (Jefferson's recognition), 565-66 (also addressing a 1994 Human Rights Committee decision), 626 (addressing *Cicippio v. Islamic Republic of Iran*, 18 F. Supp.2d 62 (D.D.C. 1998) and complicity of Iran in hostage-taking). Civil liability for fault is normal in international law. See, e.g., *id.* at 406-07, 410, 869, 871; RESTATEMENT (THIRD), *supra* note 28, at § 601.

Clearly, if the military had acted as a *de facto* agent of UNOCAL, liability also could have been based on negligence under the customary "knew or should have known" standard. See, e.g., PAUST ET AL., *supra* note 2, at 17, 21, 288-90, 293, 302, 305-07, 310-11, 329, 332-34, 342 (also addressing application of the standard where persons who commit violations are under one's effective authority or control). Concerning such a standard under international criminal law, see, e.g., PAUST ET AL., *supra* note 9, at 29-30, 46-76, 99, *passim*.

32. 67 F. Supp.2d 424 (D.N.J. 1999). With respect to nonimmunity, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330(a), 1602 *et seq.*, recognizes immunity

individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law.”³³ In 1907, an Opinion of the United States Attorney General recognized that a private United States dredging company violated a treaty by dredging activities diverting the Rio Grande, noted that an International Water Boundary Commission “found . . . that the . . . Company . . . violated the stipulations of that treaty,” and recognized that injuries included “damage to property,” including injury to “riparian rights,” and “[a]s to indemnity for injuries which may have been caused to citizens of Mexico, I am of the opinion that existing statutes provide a right of action and a forum . . . the statutes [including the ATCA] provide a forum and a right of action.”³⁴

merely for foreign states and foreign state entities. *Id.* § 1603(b). It clearly does not apply to individuals (official or private) or to private juridic entities. *See also Amerada Hess*, 488 U.S. at 438, quoted *supra* in note 28. Moreover, even when the FSIA reaches foreign state entities, the violation of treaties exception to immunity contained in §§ 1330(a) and 1604 assures that violations of human rights treaties are not entitled to immunity, especially since human rights law requires access to courts and application of the right to an effective remedy.

33. *Id.* at 445.

34. 26 Op. Att’y Gen. 250, 251-53 (1907). It had been recognized near the time of formation of the ATCA that the ATCA provides both a right of action or “remedy by a civil suit” and a forum. *See* 1 Op. Att’y Gen. 57, 58 (1795). Access to courts by aliens and rights to a remedy for violations of international law were of great importance in order to not “deny justice” to aliens, which would constitute a violation of international law by the United States and exacerbate relations with foreign states. An original purpose of the ATCA was to avoid a “denial of justice” to aliens in violation of customary international law by providing them access to our courts with respect to injuries received here or abroad at the hands of United States nationals or others found within the U.S. *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782-83 (D.C. Cir. 1984) (Edwards, J.), (quoting THE FEDERALIST No. 80 (A. Hamilton)) and adding: “Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state’s territory.”) *See also* RESTATEMENT (THIRD), *supra* note 28 § 711, cmts. a, c, e, RN 2 (denial of access to courts, judicial denial of human rights, and denial of remedies for injury inflicted by state actors or private persons); 1 Op. Att’y Gen. 57, 58 (1795) (Bradford, Att’y Gen.); PAUST, *supra* note 2, at 199, 258-61 ns.479, 481; 385 n.87; Anthony D’Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT’L L. 62, 64-65 (1988); Stephens, *supra* note 28, at 522.

Today, it is also well-recognized that the ATCA provides a cause of action or right to a remedy and that the only relevant inquiry is whether suit is brought by an alien, for a tort only, alleging a violation of international law. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1474-75 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 424-25 (2d Cir. 1987), *rev’d on other grounds*, 488 U.S. 428 (1989); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 777, 779-80 (Edwards, J.); *Filartiga v. Pena-Irala*, 630 F.2d at 880-82, 884-85, 887; *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 441-43 (D.N.J. 1999); *Jama v. I.N.S.*, 22 F. Supp.2d at 362-63; *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass.

In addition to cases involving claims under the ATCA, lawsuits brought against companies under other United States statutes or domestic legal provisions have led to recognition of the applicability of relevant human rights precepts in varied contexts.³⁵

1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987); *Guinto v. Marcos*, 654 F. Supp. 276, 279-80 (S.D. Cal. 1986); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1379 (W.D.N.Y. 1985) (court can fashion remedies); 26 Op. Att'y Gen. 250, 252-53 (1907); 1 Op. Att'y Gen. 57, 58 (1795); PAUST, *supra* note 2, at 203, 206-08, 212, 281 ns.560-61, 282 ns.570-71. See also *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862-63 (E.D.N.Y. 1984) (international law provides "substantive principles" and "tort" means wrong under or in violation of international law). But see *Tel-Oren v. Libyan Arab Repub.*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J. concurring). Judge Bork's views were in error, were opposed by Judge Edwards in *Tel-Oren*, and have not been followed. See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 442 n.20 (Bork's "highly criticized opinion," "reasoning is flawed"); *Kadic v. Karadzic*, 70 F.3d at 238; *Forti v. Suarez-Mason*, 672 F. Supp. at 1539.

Even if the ATCA did not provide a right to a remedy, human rights treaties incorporated through the ATCA provide rights enforceable by private parties, and human rights law requires access to domestic courts and enforcement of the right to an effective remedy. See, e.g., PAUST, *supra* note 2, at 75 n.97, 198-203, 256-72 ns.468-527, 280 n.556, 292, 362, 375-76, *passim*; PAUST ET. AL., *supra* note 2, at 72-73, 266-68, 273, 344, 459, 726; *Dubai Petroleum Co. et al. v. Kazi*, 12 S.W.3d 71, 82 (Tex. 2000) ("The Covenant [ICCPR] not only guarantees foreign citizens equal treatment in the signatorie's courts, but also guarantees them equal access to these courts.").

It should also be noted that the ATCA is congressional legislation that executes, implements or incorporates by reference treaties of the United States. See, e.g., PAUST ET. AL., *supra* note 2, at 194; PAUST, *supra* note 2, at 207, 282 n.571, 371-72; Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 327 & n.126 (1999); Paust, *Suing Karadzic*, 10 LEIDEN J. INT'L L. 91, 92 (1997). The ATCA performs the very role that implementing legislation plays with respect to non-self-executing treaties and it also provides a cause of action and a remedy. Thus, treaties that are not self-executing for the purpose of creating a private cause of action are executed or implemented by the ATCA. *Ralk v. Lincoln County*, 81 F. Supp.2d 1372, 1380 (S.D. Ga. 2000) ("because the ICCPR is not self-executing, Ralk can advance no private right of action under the" treaty, but "could bring a claim under the Alien Tort Claims Act for violations of the ICCPR"). But see *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 439 n.16 (missing this point when suggesting in false dictum that two law of war treaties (1) do not "confer rights enforceable by private parties," but see *Kadic*, 70 F.3d at 242-43; Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 360-69 (1991), and (2) are entirely non-self-executing—and then falsely concluding, in terse, unreasoned and unsupported dictum beyond what plaintiff had argued or briefed, see *id.* at 439, that "[s]ince neither . . . provide a private action, they cannot provide a basis for suit under the ATCA." (even under *Iwanowa's* false dictum, human rights treaties are clearly distinguishable because they provide a private action). More generally, the ATCA expressly incorporates all treaties of the United States by reference and it is the ATCA that provides the direct basis for a lawsuit or private action, not the treaties as such. Further, it is not the prerogative of courts to rewrite a long-standing statute to apply merely to some treaties but not to others.

35. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 155 (1989) ("fundamental human right to privacy"); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 483, 487 (1974); *Novotny v. Great American Federal Savings*, 584 F.2d 1235, 1248, 1254, 1261 (3d Cir. 1978) ("human right" of equal opportunity for female employees and the 1964 Civil Rights

Recognition of human rights responsibilities of private persons, companies, and corporations also exists in judicial decisions outside the United States. For example, Japanese³⁶ and German³⁷ cases have recognized such forms of private responsibility, and the European Court of Human Rights has recognized that private "terrorist activities . . . of individuals or groups . . . are in clear disregard of human rights."³⁸ More recently, the British House of Lords recognized that a private corporation's responsibilities under domestic employment law are also "[s]ubject to observance of fundamental human rights"³⁹ In 1998, the Supreme Court of Canada also recognized that it is possible "for a non-state actor to perpetuate human rights violations on a scale amounting to persecution" within the reach of the Refugee Convention and, thus more generally, that private actors can engage in human rights violations.⁴⁰ Previously, the Supreme Court of Canada had also recognized that sexual harassment in the workplace can involve a corporate violation of human rights precepts concerning sex-based discrimination that were actionable under Canadian human rights legislation.⁴¹ An Israeli Supreme Court Justice has also recognized that "basic human rights are not directed only against the

Act); *Aetna Life Ins. Co. v. Allen*, 32 F.2d 490, 494 (1st Cir. 1929); *In re Nazi Era Cases*, 2000 U.S. Dist. Lexis No. 18148 (D.N.J. Dec. 5, 2000) (voluntary dismissal of human right and other claims occurred because of agreement re: redress through an available fund); *Continental Data Systems, Inc. v. Exxon Corp.*, 1986 U.S. Dist. Lexis No. 23490 (E.D. Pa. 1986) (quoting *Kewanee Oil Co.*); *Premier-Pabst Corp. v. Elm City Brewing Co.*, 9 F. Supp. 754, 758 (D. Conn. 1935); *Behrens v. Illinois Central Railway Co.*, 192 F. 581, 582 (E.D. La. 1911) (act of Congress reaching a private company provides "betterment of human rights"). See also *Trotter v. Jack Anderson Enterps., Inc.*, 818 F.2d 431 (5th Cir. 1987) (indirect attention to alleged Coca-Cola plant involvement in human rights violations in Guatemala); *Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364, 370 (6th Cir. 1977) ("basic civil rights of man" in the employment arena); *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1011 (S.D.N.Y. 1915) (not "right of mankind" to contract out of all courts); *Jones v. Great Southern Fireproof Hotel Co.*, 86 F. 370, 375-76 (6th Cir. 1898) (liberty of contract is one of the "inalienable rights of man"); *Kyriazi v. Western Electric Co.*, 461 F. Supp. 894, 942 (D.N.J. 1978) (discussing sex-based discrimination claims in the employment arena).

36. See *supra* note 28.

37. See *supra* note 5.

38. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (Ser. A) at ¶ 149 (1977).

39. *Johnson v. Unisys, Ltd.*, UKHL/13, at 37 (Mar. 22 2001) (Lord Hoffmann).

40. *Pushpanathan v. Canada*, 1 S.C.R. 982 (1997) also noting a related practice of Australia. The Court recognized that private violations of human rights fell within the scope of Article 1 F (c) of the Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, which deals with denial of refugee protections to persons "guilty of acts contrary to the purposes and principles of the United Nations." U.N. Charter purposes and principles include the need to respect and observe human rights.

41. *Janzen v. Platy Enterprises Ltd.*, 1 S.C.R. 1252 (1989). Sex-based discrimination is a violation of human rights law. See, e.g., U.N. Charter, arts. 1 (3), 55 (c); International Covenant on Civil and Political Rights, *supra* note 17, arts. 2 (1), 26.

authority of the state, they spread also to the mutual relations between individuals themselves.”⁴²

IV. CONCLUSION

From the above, it is clear that non-state actors involved in terrorism and other violations of human rights law are vulnerable to prosecution and civil suits in domestic fora. In particular, various international crimes and infractions allegedly engaged in by bin Laden and his followers, including companies and corporations under his control, can be addressed in United States courts. Civil liability can reach private actors directly and as private actors participating in a joint venture or complicitous conduct with other actors or as actors colored by a connection with a state, state entity, or other public actor.

42. *Hevra Kadisha, Jerusalem Burial Company v. Kestenbaum*, C.A. 294/93, 46(2) P.D. 464, 530 (S. Ct. Israel 1992) (Barak, J.).

PANEL ON PEACEKEEPING: LEGAL AND POLITICAL ISSUES

*Roy S. Lee**

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* Prepared by Ms. Jennifer Schense, Special Rapporteur. Panel participants: Dr. Roy S. Lee, Chair, Special Senior Fellow, United Nations Institute for Training and Research; Dr. Hans Corell, Legal Counsel for the United Nations and Under-Secretary-General for Legal Affairs; Professor Ian Johnstone, Fletcher School of Law and Diplomacy; Adriaan Verheul, United Nations Department of Peacekeeping Operations. Panel presented at the International Law Association's ILA Weekend, New York, New York, United States, October 2001.

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I. INTRODUCTORY REMARKS FROM DR. ROY S. LEE

Lee: Welcome to this panel, dealing with one of the most important activities of the United Nations, peacekeeping operations. The Panel will focus on legal, policy and doctrinal issues and we have an excellent panel.

On my right is Mr. Hans Corell, who is the Legal Counsel of the United Nations, who came to the United Nations with rich experience in the administration of justice, law-making, and institutional management. He has been involved in all the legislative activities of the United Nations. He will discuss political and legal issues relating to peacekeeping issues.

Mr. Verheul on my left will discuss the policy issues. Mr. Verheul is a specialist in peacekeeping operations. He works at the United Nations Department on Peacekeeping Operations and he has been in charge of a number of large peacekeeping operations, particularly in Africa.

Professor Johnstone will look at this subject from the doctrinal standpoint, and he will give us the benefit of his assessment of the subject matter from both the practical and theoretical standpoint. Before he joined the United Nations, he worked at the International Peace Academy. He was then recruited to the Office of Legal Affairs, then moved to the Peacekeeping Operations Department, then the Office of the Secretary-General. Now he is an academic. After the panelists have made their presentations, the floor will be open for questions and comments.

Before I turn the floor to the panelists, I would like to give you some background information on peacekeeping. First, a story. A few years ago, I had the opportunity to congratulate a French gentleman upon his assumption of the responsibilities for a large peacekeeping operation. He was a full general in the French army and had conducted many military missions around the world.

To my surprise, he said, "Don't congratulate me, it's really an impossible job. Let me tell you why."

"First, I have a difficult mandate that will be hard to implement. It is not very realistic to expect me to maintain peace, law, and order, when both parties involved are not ready to implement a cease-fire agreement, and there is no peace to keep on the ground."

"Second, I have two thousand soldiers coming from eight different countries. They are poorly equipped, and in many cases I have to match equipment from countries A and B with the soldiers from countries of X and Y."

"Third, we are not supposed to use force except in case of self-defense."

"Fourth, they all speak different languages and have their own national commanders. Although they are supposed to be under my command, I have a suspicion that whenever there is a special situation, the first thing they do is to call their capitals."

"Finally, the territory we are in has no infrastructure. Without sufficient electricity or water, the first thing we have to do is to buy generators to produce electricity. I have no headquarters either. We will be camping in the field for at least the next six to eight months."

"Do you really want to congratulate me? Yes. I am the United Nations military commander with two thousand men, but this is worse than a general without an army."

I mention this to serve as a point of departure for our panelists. Let me now give you a few figures relating to the current peacekeeping situation. Since 1948, the United Nations has established fifty-four operations, thirty-nine have been completed, and there are fifteen existing peacekeeping operations: four in Africa, two in Asia, five in Europe, and

four in the Middle East. Five have been completed in the Americas, but none are there at present. At its peak, 78,000 soldiers and civilians were dispatched, at a cost of US\$ 3.6 billion per year, with the highest fatalities experienced at its peak (between 150 and 250 soldiers a year killed). The operating costs of the existing fifteen missions are at about US\$ 2.5 billion. Allow me to note that this is less than the annual budget of New York City's sanitation department. There is a deficit of US\$ 3.4 billion that member States owe to the United Nations for their contributions to peacekeeping operations. With this background we now turn to Dr. Hans Corell.

II. REMARKS OF DR. HANS CORELL

Corell: Thanks. It is a pleasure to be with you this morning and to discuss peacekeeping. I am glad to have my fellow panelists with me, as they know much more than I do about the details, being part of the Department of Peacekeeping Operations. I also recognize in the audience true experts in the field, including Oscar Schachter.

Let me start with a brief introduction, for those who know less about peacekeeping operations. Such operations are not even mentioned in the United Nations Charter. The Organization has invented them over the years. The classical situation was an international conflict with a peace agreement, and the parties to that agreement wanted the United Nations to be present. Gradually there has been a shift, and now conflicts tend to be internal. Such conflicts are always much more vicious, and more difficult to deal with. The United Nations is sent in to keep a peace that is not always present, and must deal with factions who often see the United Nations operations as partial and accuse them of taking sides.

From having been a relatively straightforward operation, peacekeeping has become quite complex. There is often also reference to Chapter VI of the United Nations Charter. Chapter VI missions however, are voluntary and are based on acceptance by the receiving State. Now, however, Chapter VII, which allows the Security Council to act without this acceptance, has been applied. The real change came when the two missions were set up for Kosovo and East Timor, because these are not ordinary peacekeeping operations, but are rather intended to govern, with all the attaching complications.

Let me focus on a few political elements. When is a peacekeeping operation born? How does it appear in reality? There is the feeling among States that something must be done and no one else is there or wants to do it. The United Nations feels this pressure to do something, when no one else is prepared to act. The problem is one of political will. Is that will

also demonstrated in commensurate resources? I am sure my co-panelists will address this matter.

Also, we should remember there are two actors here: the Security Council, which sets up the operation, and the General Assembly, which funds it through a separate mechanism. There could be tension between the two, as the General Assembly does not always feel properly consulted by the Security Council. This can affect the prospects for success of the operation.

Who will go there? The United Nations does not have any troops, but rather is dependent upon contributions from member States. It is fair to say that over the years there has been closer cooperation between the Security Council and troop-contributing countries, because the latter want information about what will happen to their troops. They do not want to put their young men and women in harm's way. It is very important also for the government to consult at the national level with the opposition because the government does not want to be criticized by them if something goes wrong.

The scope of the mandate is also very important. A peacekeeping operation must have a clear mandate. The mandate should be seen as distinct from the rules of engagement. What are the rights and obligations of the troops, once they are sent into the field? Other elements have presented themselves, in the political context, in particular human rights. We cannot just stand by when human rights are being violated, we must speak out. Gradually, human rights have been included in the mandate of peacekeeping operations. It infuses a new culture into the area where an operation is conducted; the purpose is to create a better atmosphere.

Another element is the question of transition. We must look at the post-mission situation. Other actors must start planning for activities to be phased in, as peacekeeping operations end.

In regard to the United Nations not having any forces of their own, the drafters of the United Nations Charter took a different view from what has actually transpired. See article 43, which calls upon all members of the United Nations to make available to the Security Council upon its call and in accordance with special agreements armed forces, assistance and facilities, including rights of passage to uphold international peace and security. I do not think that this will ever come true; member States have taken a different course, setting up stand-by forces. They prefer to look at a situation when it occurs and decide on a case-by-case basis when to send them in. This is an interesting development; you can see that some provisions of the Charter never took on life.

Now, what about the United Nations's preparedness? Are we prepared for peacekeeping operations? This is where we have a big

problem. I mentioned the Brahimi report, and there are others. There are numerous studies of peacekeeping. The Brahimi report sets out some of the weaknesses of the system. Out of this report came the conclusion that we must look at the infrastructure of the Organization, to ensure that it is equipped to deal with these difficult situations. The idea is to strengthen the Department of Peacekeeping Operations, so it can deploy peacekeepers within thirty to ninety days; there should be pre-arranged letters of assist between the United Nations and troop-contributing countries; there could be stand-by arrangements with certain member States; and most importantly, the military is not enough. Several thousand civilian police, for example, are now involved in peacekeeping operations. So, to sum up on the political side, the situation is more and more complex and the preparedness of the Organization is perhaps not what it ought to be. At the same time, the expectations of what the Organization can do are too high.

I could mention a very good example. How many of you have seen calls from the media to undertake an operation in Afghanistan? Presently, there is no way the United Nations can go in and do something useful in Afghanistan by way of peacekeeping; we would require a totally difficult situation internally in that country.

As for legal issues, I mentioned that the United Nations Charter does not touch upon peacekeeping, and also mentioned Chapters VI and VII. What I would focus on is Chapter VII. If you study the relevant resolutions, you would see that Chapter VII is only referred to occasionally in resolutions, to allow missions to protect themselves with the use of force. Sometimes though it is invoked as an umbrella over the whole resolution, allowing the whole resolution to be enforced. In some cases, as with East Timor and Kosovo, it allows the mission to govern.

The relationship between the Security Council and the General Assembly is important because the General Assembly must decide about the funds.

Another important legal issue is the Status-of-Forces Agreement, which is concluded with the country where forces are deployed. It creates a relationship with the host country. It is very important to remember that troops contributed are still under the jurisdiction of the State that contributed them. Unfortunately not all troops behave as they should, and some have to be repatriated and may have to be brought to justice before national courts. There are also the agreements with the troop-contributing countries, to regulate the relationship between those countries and the United Nations. There you have the problem that Roy Lee pointed to, that troops may consult with their capitals before they will go along with their head of mission. This is a very delicate matter, and maybe Mr. Verheul knows more about that.

Then we have procurement; from the start, it was normally handled through the troop-contributing countries. But then in the early 1990s, the United Nations decided to head to the open market with requests for bids. Now, millions of dollars are spent on contracts supporting the missions. This can lead to disputes, which must be settled through arbitration. This has become quite an industry in the Office of Legal Affairs. My colleagues and I had to defend one case, involving a claim of \$50 million against the Organization. This is a big issue for us now.

There are also many legal issues that arise during a peacekeeping mission. For example, deaths that occur during missions raise legal issues, as do accidents (car accidents injuring civilians, for example). We have crimes committed against the mission or by people in the mission. There are contracts to be negotiated at the local level, or issues if a peacekeeper is to appear before a court. Often there is a legal officer present in the field to deal with these issues on a daily basis, and sometimes issues are referred back to Headquarters. I follow the cable traffic between Headquarters and the field not only for information, but also to track legal issues, which gives me advance notice of possible formal requests from the Department of Peacekeeping Operations. The tempo of the legal work has increased dramatically.

Now, the two missions I mentioned, East Timor and Kosovo. Here we have a distinct legal difference because we govern these provinces and legislate for them. The laws (regulations) are issued by the Special Representative of the Secretary-General after being vetted in the Office of Legal Affairs. This vetting is necessary. At the national level, legislation is the product of a democratic process, but here this cannot happen since there is not yet a parliament competent to do this. We check whether the regulations are in accordance with the United Nations Charter, with the mission's mandate, *i.e.* the relevant Security Council resolutions, and with international human rights standards.

Lee: Thanks, now from the legal and political aspects, we turn to Professor Ian Johnstone for his assessment from the doctrinal standpoint.

III. REMARKS OF PROFESSOR IAN JOHNSTONE

Johnstone: I will look at the development of peacekeeping doctrine over the years, in particular in the 1990s. As a preliminary point, there is no universally accepted doctrine of peacekeeping. Instead, there are fifty years of accumulated experience and some effort over the years to provide some clarity as to what peacekeepers should do, what the Security Council expects them to do. Those efforts first resulted in the formulation of three fundamental principles: consent, impartiality and non-use of force, except

in self-defense. My presentation will focus on what those three principles mean in practice and how they have evolved over the years. I would also ask the question at the end as to whether these doctrinal innovations have succeeded in providing clarity.

First, consent. Peacekeeping operations were originally based on Chapter VI of the United Nations Charter, deployed on the basis of consent and depended for their success on the continuing cooperation of the parties. Peacekeepers were there to provide the parties some reassurance that the other party or parties would not cheat on their commitments and obligations.

Second, impartiality. Impartiality, as originally conceived was understood to mean that peacekeepers shouldn't take sides in a conflict or seek to alter the military balance in any way. The term impartiality was often used interchangeably with neutrality.

Third, non-use of force except in self-defense. Traditionally, peacekeepers were unarmed or lightly armed troops and not expected to use force except to the minimum extent necessary and only in self-defense. This concept was expanded in 1973 to include defense of the mandate, meaning force could be used by peacekeepers to resist forceful attempts to obstruct them in the discharge their duties. This potentially broad concept was invoked rarely by commanders on the ground because they were concerned about becoming a party to the conflict.

Now, these traditional principles worked fairly well during the cold war years. They also worked fairly well in some post-cold war operations, in Namibia and Mozambique, for example. Even though these missions were much more complex than the simpler operations of the earlier years, the parties involved were genuinely ready for peace and amenable to making the operations work.

But most of the post-cold war conflicts were much messier and the traditional principles could not be so easily applied. This changed environment for peacekeeping was recognized early on by the Security Council, and in 1992 the Council asked the Secretary-General for recommendations, leading to the Agenda for Peace, published also in 1992. The tone, if not the content of Agenda for Peace, marked a significant departure from the traditional principles of peacekeeping. The most significant concept was the idea of peace-enforcement units. The idea was to deal with situations that fell between the environment where traditional peacekeeping can take place, and outright aggression or war. In other words, they would occupy the middle ground between peacekeeping and enforcement action. In these situations, consent was not reliable, force had to be used beyond self-defense but not for the purpose of waging a war, and impartiality was harder to maintain. In this gray area, there was

no doctrine. Troops were being deployed and asked to do things without really knowing how they should go about doing them. So, there were efforts to develop doctrine to cover this area, but events on the ground, especially in Somalia and Bosnia, were always ahead of doctrinal developments.

There were significant United Nations failures or at least setbacks, in Somalia, Bosnia and Rwanda. These failures led to serious questioning and rethinking of involvement in this gray area. This rethinking led to a supplement in 1995 to the Agenda for Peace, which was not meant to revise the earlier document, but does represent some significant backtracking. The main lesson drawn in the Supplement is that peacekeeping and peace enforcement should not be mixed, as they were in Somalia and Bosnia. As noted by Shashi Tharoor, head of the Yugoslavia desk in DPKO at the time, it is no easy task to make war and peace with the same people on the same territory at the same time. The Security Council was adding mandate after mandate, some of which required the cooperation of the parties, and some of which required coercion. How could peacekeepers do both at the same time? The incoherence of this approach was most dramatically illustrated by the fall of the safe areas in Bosnia. Civilians in the safe areas expected to be protected by thinly deployed peacekeepers, with only the threat of air strikes, made less credible by the vulnerability of peacekeepers to being taken hostage.

The Supplement reflected the mood in the Secretariat and among Member States at the time, but it was not the final word. In 1999-2000, three very important reports were produced: one on Srebrenica, and two on Rwanda (the Srebrenica and first Rwanda report are United Nations documents; the second Rwanda report is an OAU report). These reports drew some of the same conclusions as the Supplement, but said something else as well. The failures were not just a matter of inadequate means or mandate, but a question of how peacekeeping itself is carried out - the whole ideology of peacekeeping. These three documents prompted the Secretary-General to establish the Brahimi panel, which convened in early 2000 and drafted a report, against the backdrop of the ongoing crisis in Sierra Leone. In Sierra Leone, peacekeepers were being taken hostage - just like in Bosnia - and there were concerns that the situation was getting out of control.

The Brahimi report reaffirms the traditional principles of peacekeeping, but qualifies each in significant ways. On consent, the report says that consent can be manipulated, and goes on to list a range of circumstances where you can't count on it. On impartiality, it redefines the concept to mean not neutrality but impartiality in the execution of the mandate. On the use of force, the report says that the operations must be

prepared to take on spoilers, parties or other actors who try to undermine a peace process. Spoilers must be met with a credible threat of force. The implication of the report is that the United Nations or its operations must be prepared to conduct robust peacekeeping. Many of the institutional recommendations are intended to prepare the United Nations to do this.

Does the report provide clarity on the traditional principles? Is it a step forward in terms of doctrine? Does it make distinctions that are useful in trying to devise concepts of operations and carry out missions in the field? My answer is that yes, it does provide some clarity; it doesn't provide full answers to the doctrinal debates of the last ten years, but points to some possible directions forward.

On consent, implicit in the report is the idea that the only clear distinction is between situations where consent is initially granted and those where it is not. Intervention in the latter situation is not peacekeeping or peace-anything, it is war and those engaged in it should be prepared to conduct war. In the first situation, where consent is granted, sometimes it is reliable, more often it is not. The message of the Brahimi report is that peacekeepers should not assume that consent is always reliable. This implies a need to build on the initial consent and work to sustain it over time.

Another implication is that if consent is not reliable all the time, you may need to use force against spoilers. While it is not explicit, the Brahimi report seems to distinguish three situations in which force may be used: in self-defense (that is traditional peacekeeping); to take on spoilers and compel them to comply with an agreement; and to defeat an enemy (that is enforcement action).

That brings me to my third and final point, on impartiality. If force is used against spoilers, is it possible to maintain impartiality? I think it is possible if impartiality is defined as it is in the Brahimi report, i.e. not neutrality, but impartiality in execution of the mandate. An important corollary of that is at the heart of challenges faced by peacekeepers. If the guiding principle is impartiality in execution of a mandate, the mandate must be clear to all concerned - the parties, the peacekeepers and external actors. You can look back at all the resolutions adopted in the 1990s on peacekeeping mandates and clarity is rare. So the challenge is not really a legal or doctrinal one, but a political challenge for intergovernmental bodies. The application of the principles of peacekeeping will follow naturally from mandates set by the Security Council. The challenge for the Secretariat, as the Brahimi report points out, is to insist on this clarity.

Lee: From the doctrinal perspectives, we now turn to Mr. Verheul for his operational experience.

V. REMARKS OF MR. ADRIAAN VERHEUL

Verheul: Thanks, with an eye on the time, I will keep this brief. I will do two things: characterize peacekeeping as the intensive care unit of the international community, and describe the prerequisites of the surgeons who must deal with the patient. The objective of peacekeeping is not to create a perfect situation, but the conditions that will allow the patient to walk out on his own two feet and continue treatment elsewhere. This means establishing a security regime, building institutions in the field of governance and human rights that are lacking, participating in psychological wound healing, promoting processes that put countries back on their feet, like elections, and creating conditions that would enable reconstruction, like disarmament.

This is what peacekeeping can potentially offer. As Ian has pointed out, sometimes the patient is less than willing to undergo treatment, which is why you need a couple of well-built nurses to keep the patient down from time to time. Robust peacekeeping is needed, as it was in Sierra Leone. Regarding the doctor, it is not correct to say that peacekeeping is in the hands of the United Nations Secretariat alone. Its success depends on five players working together. If one is missing, the risk of failure is real. First, the willingness of the parties to undertake a peace process is essential. Consent is important at the strategic and technical level. Second, the Security Council must demonstrate a measure of unity and common understanding of the tasks ahead. If the Security Council is divided, this division can be exploited. Third, the support of troop-contributing countries is essential, to ensure that troops who can actually do the job are deployed. This has been a crisis; the experiences of the 1990s have deterred western countries from participating. The risks, political and otherwise, are real. So it is increasingly harder to put together a force that reflects all the members of the United Nations. We more often get troops from countries that cannot come up with the equipment necessary to sustain themselves on the ground. This is a huge logistical problem. We must go to the market to meet this need, a task in and of itself. This is a bigger problem though because it does not reflect the needed unity of the member States. The Security Council sets the mandate, then expects poorer countries to send their troops to run the risks in trying to fulfill the mandate. Fourth, the international community must support the peace process through injections of funds and programs, to help the rehabilitation, reconciliation, and redevelopment processes. Another aspect to this is that peacekeepers alone cannot provide everything. The World Bank, the World Food Program, and others must bring their unique skills and programs into play. There must be a

complementarity of efforts. We have only now really begun in the last half year or so to make this a more operational concept. This is difficult because it means changing the culture of the organizations in question. We are slowly but surely making progress in this area. Fifth and finally, the United Nations Secretariat plays a central role. The Department of Peacekeeping Operations will soon grow to around 600, but this is not nearly enough to support the operations currently in the field. No government or corporation would allow this logistics ratio to stand. We are getting a few more tools, in part due to the Brahimi report, but it remains a relatively tight operation. These are the links of the chain, and the overall context is as strong as the weakest link.

VI. QUESTIONS AND COMMENTS FROM THE FLOOR

A. Does the United Nations engage in strategic planning or "wargaming" to better plan for peacekeeping operations?

Corell and Verheul both addressed this question. Corell noted that the Secretary-General had established an Executive Committee on Peace and Security, to advise him on matters in this field. He had also attempted to establish a new unit in the Department for Political Affairs in order to be able to gather information more effectively, in particular to be able to make better analyses before the creation and implementation of peacekeeping operations. This effort had met with some resistance in the General Assembly, some members are reluctant to share too much sensitive information with the Secretariat. Verheul noted that wargaming is difficult in situations where there are so many actors, their motives are often hidden or unclear, and much necessary information is lacking. The United Nations must rely on member States to provide much of the requisite information, aside from what the United Nations can learn from its staff who operate in the field. Taking into consideration these limitations, the United Nations Department of Peacekeeping Operations does undertake this kind of strategic thinking on a daily basis and works to develop templates that will render peacekeeping operations more effective and successful.

B. Have the member States of the United Nations and in particular of the Security Council abdicated their responsibility to fulfill article 43 of the United Nations Charter, to make available to the United Nations the "armed forces, assistance, and facilities" necessary to maintain international peace and security?

Verheul and Johnstone responded to this question. Verheul noted that abdication of responsibility is not simply an issue regarding provision of troops, but also in prompt payment of assessments. Where States pay their assessments in a timely manner, their troop contributions are less essential. Also, provision of logistical support is critical. Johnstone referred to the mission in Eastern Slavonia as worth mentioning because the Belgians had learned lessons in Rwanda, which they were able to successfully apply in Eastern Slavonia. Specifically, they agreed to be involved only if necessary resources would be made available to the mission and if they could exercise a certain degree of control over the operations. Verheul added that a major difference between Rwanda and Eastern Slavonia was that, in the latter case, NATO was close at hand, and prepared to intervene on behalf of the United Nations at the first sign of trouble. NATO was not and is not engaged in Africa.

C. What might be the future role of the United Nations in Afghanistan, if the Taliban regime loses power? Do activities undertaken by member States to eliminate offensive capacity of a government or to eliminate the government qualify as self-defense under article 51 of the United Nations Charter?

All three speakers responded to this question. Corell noted that he could not speak extensively on the subject; he referred instead to the ongoing work of the Secretary-General's Special Representative on Afghanistan, Mr. Brahimi. Specifically on the subject of article 51, he noted that the Security Council is actively seized of this matter, and has invoked article 51 in its resolution of September 12. The two States taking action under article 51, the US and the UK, are responsible for reporting on their actions under this article to the full Council and thus far have met with no criticism. Verheul noted that peacekeeping in Afghanistan wouldn't necessarily be the United Nations's first step, but rather it should focus on the provision of humanitarian aid. A new coalition of States might also have to be encouraged to form, to address security-related and political issues. It is essential to create the environment that will support a successful peacekeeping operation. Johnstone agreed, noting that the United Nations would have considerable difficulties in executing any

operations in Afghanistan, given the lack of security that country will experience, should the Taliban be ousted from power.

D. What are the prospects for the creation of world government, given the successes and failures of the United Nations?

Verheul and Corell responded to this question. Verheul remarked that the idea of world government is an old dream that many have expressed. The way the United Nations is built would contradict that dream. It is an organization of member States, each of which are sovereign and unwilling to give up that sovereignty. So, to ask whether the United Nations could put in place a world government is a contradiction in terms. This question should not be directed at the United Nations, but at the member States, whether they would be willing to work towards world government. He personally could not see it happening for the next century or so, but was reminded that the United Nations is seen by many people in different ways. Some see it as a Machiavellian body of member States that scheme and conspire; while for others it remains a symbol of hope. The United Nations has a strong role to play in pursuing the hopes and dreams of mankind. Corell noted that he personally could see no alternative to the sovereign State, as the basic building block of the international system. The State is most capable of providing order and guaranteeing peace; boundaries help to create order. The United Nations's role is in helping to ensure that member States are represented by governments that truly hold the mandate of their people. The more democracies in the United Nations, the better will the Organization be able to deal with States that occasionally "flip out". The question that remains unanswerable regarding the prospects of a world government is the Roman query: who supervises the supervisors?

E. How can the relations between the United Nations Secretariat, including the Secretary-General, and the Security Council be improved, given the difficulty the Secretariat has experienced in executing the Security Council resolutions pertaining to Bosnia and Rwanda?

Johnstone responded to this question, also touching upon a quote from the Brahimi report that was raised several times: that the United Nations Secretariat must be prepared to tell the Security Council what it needs to know, not what it wants to hear. Johnstone argued that the Secretariat cannot outright refuse to implement a Security Council resolution, but can advise against action that is ill-advised. The Secretariat also plays a key role in encouraging troop-contributing countries to participate in

operations, and so the Secretariat must be onboard with whatever the Security Council decides. In the end though, Johnstone saw the Brahimi quote as a message to the Security Council rather than to the Secretariat. It is to be hoped that the Security Council has learned lessons from the peacekeeping operations of the 1990s and that the Council would be much more reluctant to draft unimplementable resolutions, as it has done in the past.

F. What are the prospects of a peacekeeping operation in Palestine, either authorized by the Security Council or by the General Assembly, the latter following the precedent of the Uniting for Peace resolution which sent troops to Korea?

Corell responded to this point, noting that the question was highly political and so he was limited in how he could respond. He added that many actors are engaged in trying to resolve problems relating to Palestine, and that he hoped that the situation would be resolved soon.

G. What is the future of peacekeeping, if so many States have become disillusioned by its failures?

Johnstone responded to this question, noting that the perception of peacekeeping has shifted many times between the idea that it is a panacea to the idea that it is impossible. He expressed the hope that the Security Council had learned lessons from the operations of the 1990s, which failed in part because of the incoherent behavior of the Council. He indicated that it would be instructive to see what happens with Afghanistan, given that many see the United Nations as the only reasonable post-conflict actor capable of addressing the needs of that country and region.

H. What are the objections that inhibit serious discussion of the creation of a standing United Nations peacekeeping force?

Verheul responded, noting that such a force could solve a practical problem, that is the need for rapid deployment. As it currently stands, the United Nations must enter into lengthy negotiations with troop-contributing States in order to obtain and deploy troops. However, member States have expressed a preference to improve upon stand-by arrangements, which represent promises to provide assistance but are not a guarantee to the United Nations in every case to be forthcoming with that assistance. Verheul noted that States were reluctant to consider a standing force because they were reluctant to give up that much control over the process. He added that where member States do send troops, this can be a powerful

symbol of their solidarity in the face of a threat to international peace and security and that this clout must be visible, if a peacekeeping operation is to succeed. Lee noted that the US government has gone on the record to oppose the idea of a standing force, and Johnstone concurred that the concern with this idea is that it is a technical fix for a political problem. Deployment of a standing force cannot replace the lack of political will on the part of member States of the United Nations and of the Security Council.

I. How do peacekeeping forces exercise impartiality in situations where there is no clear "good guy?"

Verheul responded, noting that the United Nations no longer employs the term "neutral." The United Nations has a mandate to protect civilians and their human rights, but of course implementation is harder. The United Nations can deal with an individual bad guy from time to time, but often needs the group they represent to be part of a political process. The use of force may be helpful in specific situations, but may also lead to the end of that group's cooperation with the peace process. The overall goal is to bring the process to a successful conclusion, not to deal with the bad guy. Deals often have to be made, and peacekeeping operations often have to deal with bad guys. If the process can be done without firing a shot, so much the better. Use of force may deliver a message to the bad guys, but the message itself is political. Delivery of that message really depends on whether the means on the ground exist, and whether member States are providing those means. Brahimi said in his report that the Security Council should be told what it needs to know, not what it wants to hear. Verheul recounted in this context his understanding that the Security Council is a partner in the process, not an adversary. The Secretariat writes reports and undertakes its work not in isolation, but maintains close contact with the Security Council. This coordination is essential, because member States have the necessary intelligence. The Secretariat must keep in mind the overall objective, and focus on that, even in the face of specific interests and goals of individual member States. There is not much to gain though in confronting the Security Council, if they then withdraw their support. The Brahimi statement is not a message to the Secretariat, but to the Security Council, to give the Secretariat the space to plan and to implement the operations.

THE UNLAWFULNESS OF THE USE OR THREAT OF USE OF NUCLEAR WEAPONS

*Charles J. Moxley, Jr.**

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I. INTRODUCTION

Our current policy is nuclear deterrence, whereby we threaten the use of nuclear weapons against any adversary who uses nuclear, chemical, biological, or even massive conventional weapons against us. I'm going to address the lawfulness of our potential use of nuclear weapons pursuant to that policy.

Both the defenders, including the United States, and the opponents of the nuclear weapons regime agree that the international law rules of discrimination, proportionality, and necessity apply to nuclear weapons. The rule of discrimination makes it unlawful to use weapons whose likely or foreseeable effects cannot discriminate between military and civilian targets. The rule of proportionality makes it unlawful to use weapons whose probable effects upon combatant or non-combatant persons or objects would likely be disproportionate to the value of the military objective. The rule of necessity makes it unlawful to use weapons involving a level of force not necessary in the circumstances to achieve the military objective.

Both the United States and the opponents of the nuclear weapons regime further agree that it is unlawful under these rules to use weapons whose effects will be *uncontrollable*. Weapons whose effects are not controllable cannot lawfully be used under international law, and this is recognized in the military manuals of the United States armed services, recognized in manuals used for training and disciplining of United States personnel, and often cited by the United States as a reliable statement of international law.

II. UNCONTROLLABILITY UNDER RULE OF DISCRIMINATION

The Air Force Commander's Handbook states that weapons that are "incapable of being controlled enough to direct them against a military objective" are unlawful.¹ *The Air Force Manual on International Law* defines indiscriminate weapons as those "incapable of being controlled, through design or function," such that they "cannot, with any degree of certainty, be directed at military objectives."²

In its military manuals, the United States has acknowledged that the scope of this prohibition extends to the *effects* of the use of a weapon. *The*

1. THE U.S. DEPT. OF THE AIR FORCE, AIR FORCE PAMPHLET 110-34, COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT 6-2 (1980) [hereinafter THE AIR FORCE COMMANDER'S HANDBOOK].

2. THE U.S. DEPT. OF THE AIR FORCE, AIR FORCE PAMPHLET 110-31, INT'L LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 6-3 (1976) [hereinafter THE AIR FORCE MANUAL ON INT'L LAW].

Air Force Manual on International Law states that indiscriminate weapons include those which, while subject to being directed at military objectives, "may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage."³ The manual states that "uncontrollable" refers to effects "which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated."⁴ It is noteworthy that this prohibition encompasses the causing of risks, not just injury.

As a "universally agreed illustration of an indiscriminate weapon," *The Air Force Manual on International Law* cites biological weapons, noting that the uncontrollable effects from such weapons "may include injury to the civilian population of other States as well as injury to an enemy's civilian population."⁵ *The Naval/Marine Commander's Handbook* states that such weapons are "inherently indiscriminate and uncontrollable."⁶

The Air Force Manual on International Law further cites Germany's World War II V-1 rockets, with their "extremely primitive guidance systems", and Japanese incendiary balloons, without any guidance systems.⁷ The manual states that the term "indiscriminate" refers to the "inherent characteristics of the weapon, when used, which renders [*sic*] it incapable of being directed at specific military objectives or of a nature to necessarily cause disproportionate injury to civilians or damage to civilian objects."⁸

As an example of an indiscriminate weapon, *The Air Force Commander's Handbook* similarly cites the use of unpowered and uncontrolled balloons to carry bombs, since such weapons are "incapable of being directed against a military objective."⁹

III. UNCONTROLLABILITY UNDER RULE OF NECESSITY

The requirement that the level of force implicit in the use of a weapon be controllable and controlled by the user is a natural implication of the

3. *Id.*

4. *Id.*

5. *Id.*

6. U.S. DEPT. OF THE NAVY ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 10-21, Naval Warfare Publication 9 (Rev. A, Oct. 5, 1989) (this handbook was adopted by the U.S. Marine Corps as FLEET MANUAL FMFM 1-10) [hereinafter THE NAVAL/MARINE COMMANDER'S HANDBOOK].

7. See THE AIR FORCE MANUAL ON INT'L LAW, *supra* note 2, at 6-3.

8. *Id.* at 6-9, n.7.

9. THE AIR FORCE COMMANDER'S HANDBOOK, *supra* note 1, at 6-1.

necessity requirement. If a State cannot control the level of destructiveness of a weapon then it cannot assure that the use of the weapon will involve only such a level of destructiveness as is necessary in the circumstances.

The Air Force Manual on International Law recognizes as a basic requirement of necessity "that the force used is capable of being and is in fact regulated by the user."¹⁰

IV. UNCONTROLLABILITY UNDER RULE OF PROPORTIONALITY

So also, if the State using a weapon is unable to control the effects of the weapon, it is unable to evaluate whether the effects would satisfy the requirement of being proportionate to the concrete and direct military advantage anticipated from the attack or to assure such limitation of effects. *The Air Force Manual on International Law* notes that the requirement of proportionality prohibits "uncontrollable effects against one's own combatants, civilians or property."¹¹

V. UNITED STATES POSITION

It is the formal United States position that under these rules of discrimination, proportionality, and necessity some uses of nuclear weapons would be lawful and that others would be unlawful—and that the lawfulness of any potential use is something that has to be evaluated in the context of that use. The United States' position is that the effects of nuclear weapons, or at least of the smaller, ostensibly tactical nuclear weapons, are controllable.

In its written and oral presentations to the International Court of Justice (ICJ) in the recent Nuclear Weapons Advisory Case,¹² defending nuclear weapons, the United States argued that, even if nuclear attacks directed at significant numbers of large urban area targets or at a substantial number of military targets would be unlawful, a small number of accurate attacks by low-yield weapons against an equally small number

10. THE AIR FORCE MANUAL ON INT'L LAW, *supra* note 2, at 1-6.

11. *Id.* at 6-2. See also *id.* at 5-10.

12. International Court of Justice: Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 827 (July 1996) [hereinafter Nuclear Weapons Advisory Opinion]. All but five of the fifteen ICJ opinions, including the holding of the Court, are available at 35 I.L.M. 809 (1996). The remaining five, the declarations of Judges Bedjaoui, Herczegh and Bravo, and the individual opinions of Judges Guillaume and Ranjeva, appear at 35 I.L.M. 1343 (1996). The opinions and various submissions to the Court are also available at the Court's own website at <http://www.icj-cij.org> (last visited Mar. 16, 2002) or at <http://www.law.cornell.edu/world> (last visited Mar. 16, 2002). Some of the same materials are also available in THE CASE AGAINST THE BOMB (Roger S. Clark & Madeleine Sanns eds., 1996).

of military targets in non-urban areas would not be. The United States further argued that nuclear weapons can reliably be targeted at specific military objectives.

VI. DEFENSE OF SMALL-SCALE USE:

Let's take first the United States' defense of small scale use. If you look at the United States nuclear arsenal, you will see that it is predominately made up of large strategic nuclear weapons, not the small-scale ostensibly tactical nuclear weapons the United States defended.

VII. PRECISION TARGETING

The United States position on its ability to control the effects of nuclear weapons through precision targeting does not withstand analysis. First of all, our ability to hit specific targets with precision is only statistical. We can deliver a warhead to a particular target with startlingly high probability, but where any particular warhead will end up is far from certain.

Even more importantly, even if we deliver the nuclear warhead with precision to the intended target, we cannot control the radiation effects. They are subject to natural forces of the environment, wind and weather. This applies to even the use of a so-called small-scale nuclear weapon.

The most cogent argument the proponents of nuclear weapons make is that under certain circumstances the effects of nuclear weapons might be controllable because of the remote area of use and the limited nature of the weapons used.

Michael Matheson, sitting to my left, one of the chief lawyers representing the United States before the ICJ in the Nuclear Weapons Advisory Case, has pointed in his writings to an example given by the United States judge on the court, Judge Schwebel, now the President of the court, in his opinion in the Nuclear Weapons Advisory Case—the use of a nuclear depth charge to destroy a submarine that is about to fire nuclear-armed missiles.

It seems to me that that kind of argument fundamentally misses the point as to the risks of nuclear weapons use and as to nature of the challenge to the rule of law that nuclear weapons present.

Mr. Matheson and Judge Schwebel are correct that if one hypothesizes a laboratory-type circumstance in which there are no other factors, just the submarine about to launch nuclear weapons and our ability to take the submarine out before the use, and assumes a remote environment where civilians will not be at risk, such a use sounds as if it must be lawful.

But is it not clear that such a scenario is unrealistic to the point of not being a legitimate basis upon which to ground the legal analysis? For if the adversary State has one submarine with nuclear weapons, it most likely has other submarines carrying nuclear weapons; if the adversary State has nuclear weapons in submarines, it most likely has other nuclear weapons which it is capable of delivering by land and sea-based missile, by aircraft, and otherwise; if the adversary State has such nuclear weapons and the means to delivery them, it may well have chemical and biological weapons and the means to deliver *them*; and if the adversary State has nuclear weapons, it will likely have allies or potential allies who have nuclear, chemical, and/or biological weapons. In addition, in the real world, any use of nuclear weapons, in the types of circumstances in which we might resort to such weapons, would likely carry with it a high risk of escalation; our adversaries would likely respond with nuclear, biological, or chemical weapons.

So, in the real world, this hypothesized strike on the submarine will likely not be as limited as it at first appeared. In real terms, this scenario will potentially put us right in the middle of widescale use by us and our adversaries of nuclear, chemical, and biological weapons. The kind of situation that threatens effects of a apocalyptic nature.

Outside the courtroom, the United States recognizes the potential uncontrollability of the effects of nuclear weapons. This can be seen from the Chairman of the Joint Chiefs *Joint Pub 3-12, Doctrine for Joint Nuclear Operations*, setting forth the current operational planning for the integrated use by United States forces of nuclear weapons in conjunction with conventional weapons:¹³ “[T]here can be no assurances that a conflict involving weapons of mass destruction could be controllable or would be of short duration.”

Outside the courtroom, the United States has also recognized the disproportionate nature of the damage United States nuclear policy threatens. The Joint Chief of Staff’s *Nuclear Weapons Joint Operations* manual states:

US [*sic*] nuclear forces serve to deter the use of WMD [“weapons of mass destruction,” including chemical, biological, and nuclear weapons] across the spectrum of military operations. From a massive exchange of nuclear

13. JOINT CHIEFS OF STAFF, PUB 3-12, DOCTRINE FOR JOINT NUCLEAR OPERATIONS (Dec. 15, 1995), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12.pdf (last visited Feb. 7, 2002). See also CHARLES J. MOXLEY, JR., NUCLEAR WEAPON AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD Ch. 2, n.75, ch. 17, nn.38-53, ch. 18, n.56, chs. 26, 27 and accompanying text (2000).

weapons to limited use on a regional battlefield, US [*sic*] nuclear capabilities must confront an enemy with risks of unacceptable damage and disproportionate loss should the enemy choose to introduce WMD into a conflict.¹⁴

I submit that virtually any use of nuclear weapons would be unlawful under these rules, such that the use of nuclear weapons is *per se* unlawful. I submit that it is clear that the effects of nuclear weapons are uncontrollable and hence that the use of such weapons would be unlawful. I further submit that, by our defense of the potential lawfulness of our limited use of small-scale tactical nuclear weapons against remote targets, we are not only justifying a huge arsenal of strategic nuclear weapons not addressed by our legal theory but also raising the level of risk of possible widescale use of nuclear weapons.

Rather than recognizing that the scale of the effects of these weapons exceeds what could be unlawful under any view of the law, we are *legitimizing* the possession, threat of use, and the potential actual use of these weapons.

To the argument, again made by Mr. Matheson, that the threat of use of these weapons can itself protect us against some other State's use of nuclear, chemical, and biological weapons, I submit that, while the point may be valid in limited circumstances, the potential gain from such deterrence is substantially outweighed by the risks created by our legitimization of these weapons.

Mr. Matheson's support of threats is also inconsistent with the legal rule that it is unlawful to threaten that which it is unlawful to do. As the ICJ stated, "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law."¹⁵ The Court noted that "no State—whether or not it defended the policy of deterrence—suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal."¹⁶ The United States, as well as not disputing the unlawfulness of a threat to commit an unlawful act, stated to the Court:

[E]ach of the Permanent Members of the Security Council has made an immense commitment of human and material resources to acquire and maintain stocks of nuclear weapons and their delivery systems, and many other States

14. DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 13, at I-2 (emphasis omitted).

15. Nuclear Weapons Advisory Opinion, *supra* note 12, at 827. *See also id.* at 823.

16. *Id.* at 823.

have decided to rely for their security on these nuclear capabilities. *If these weapons could not lawfully be used in individual or collective self-defense under any circumstances, there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless.* In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence.¹⁷

Our legitimization of these weapons has innumerable effects of the most dire sort: we develop, purchase, and maintain such weapons for use, often on a fast trigger; we threaten that we will use the weapons, causing other States to develop, purchase, and maintain their own nuclear, chemical, and biological weapons, often on even more of a hair trigger; we foster proliferation; by training our personnel and setting contingency plans in place for use of these weapons, we raise the likelihood of intentional, unintentional, and mistaken use, and, by emphasizing nuclear weapons, we may even hold back from developing conventional capabilities, or stockpiles, that would both better serve our military needs, and provide the means for the lawful conducting of armed conflict.

With the dread events of September 11th, we have now seen the effects of weapons of mass destruction or something approximating them, at first hand, have looked them in the face, breathed the air. And what we have seen are effects, sickeningly horrific as they are, that are far less than the destruction to civilians and civilian society that could result from uses of nuclear weapons we are threatening every day and have for over fifty years by our policies of nuclear deterrence and mutual assured destruction.

Indeed, to the extent our policy is or at times has been mutual assured destruction, we threaten or have threatened just this kind of thing. The very reason given by the Bush Administration pre-September 11th, for national missile defense—that our policy of mutual assured destruction, which the Administration seemed to be assuming is our current policy, is immoral and unacceptable—makes the point. Mutual assured destruction is a policy of terror.

I don't mean to suggest that we would ever intentionally conduct a nuclear strike against large civilian buildings in the middle of an urban area, but the effects of these weapons are so vast and so uncontrollable, and so many military targets are located in the vicinity of urban areas, that under our current policies, military personnel training, and contingency

17. Op. I.C.J. (1995), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat or Use of Nuclear Weapons*, available at http://www.icj-cij.org/icjwww/icasas/iunan/iunan_cr/iUNAN_iCR9534_19951115.PDF.

plans, we could end up causing such effects in the course of strikes aimed at military targets.

By our legitimization of the potential use of nuclear weapons, we are fostering proliferation and the other types of effects I alluded to earlier—and increasing the likelihood that at some time, under some set of circumstances, intentional or not, these weapons will be used on a broadscale and escalatory basis by combatants in war, causing catastrophic damage that could make the survivors nostalgic for the limited strikes of September 11th and the limited nature of the current anthrax attacks. Our current policies contribute to the risk that eventually some States will use nuclear weapons against major urban centers. Here is the United States Joint Chiefs of Staff statement setting forth our potential uses of nuclear weapons:

The Joint Chief of Staff's *Doctrine for Joint Theater Nuclear Operations*, issued as recently as February 1996, states:

Nuclear operations can be successful in achieving US military objectives if they are used in the appropriate situation and administered properly . . . Nuclear weapons have many purposes, but should only be used after deterrence has failed . . . The purpose of using nuclear weapons can range from producing a political decision to influencing an operation.¹⁸

The manual identifies types of situations where the use of nuclear weapons may be “favored over a conventional attack” or otherwise preferred:

- Level of effort required for conventional targeting. If the target is heavily defended such that heavy losses are expected, a nuclear weapon may be favored over a conventional attack.
- Length of time that a target must be kept out of action. A nuclear weapon attack will likely put a target out of action for a longer period of time than a conventional weapon attack.
- Logistic support and anticipation of delays caused by the “fog and friction” of war. Such delays are unpredictable and may range from several hours to a number of days.¹⁹

As to the purpose for using nuclear weapons, the manual states:

18. JOINT CHIEFS OF STAFF, PUB 3-12.1, DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS (Feb. 9, 1996), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12_1.pdf (last visited Mar. 15, 2002) (emphasis omitted).

19. *Id.* at III-4 (emphasis omitted).

The purpose of using nuclear weapons can range from producing a political decision at the strategic level of war to being used to influence an operation in some segment of the theater. Operations employing nuclear weapons will have a greater impact on a conflict than operations involving only conventional weapons.²⁰

The manual identifies "enemy combat forces and facilities that may be likely targets for nuclear strikes":

- WMD ["weapons of mass destruction," including chemical biological, and nuclear weapons] and their delivery systems, as well as associated command and control, production, and logistical support units;
- Ground combat units and their associated command and control and support units
- Air defense facilities and support installations;
- Naval installations, combat vessels, and associated support facilities and command and control capabilities;
- Nonstate actors (facilities and operation centers) that possess WMD; and
- Underground facilities.²¹

VIII. ADDITIONAL ISSUES

There are some other legal issues implicated in this overall question which I do not have time to go into in detail but which I believe deserve much more attention than they have gotten, and which I would like to address briefly.

In its written and oral presentations to the International Court of Justice (ICJ) in the recent Nuclear Weapons Advisory Case, defending nuclear weapons, the United States expressed or assumed the following positions:

- The United States contended that the anticipated effects from the use of nuclear weapons would have to *necessarily* and *inevitably* be unlawful before the use would be unlawful.²²

20. *Id.* at I-2 (emphasis omitted).

21. *Id.* at III-6-7.

22. See MOXLEY, *supra* note 13, at ch. 2, nn.58-62, 74, 88, and accompanying text.

- The United States ignored the *mens rea* issues as the lawfulness of the use of nuclear weapons, ignoring the potential for unlawfulness based upon less than strict intentionality.²³
- The United States argued that unlawfulness could only arise from conventional or customary international law and not from general principles of international law.²⁴
- The United States assumed that one hundred percent applicability is necessary before *per se* unlawfulness may incept.²⁵
- The United States assumed that the principles of risk analysis are irrelevant to the lawfulness of the use of nuclear weapons.²⁶
- The United States argued that the use of nuclear weapons could be lawful as reprisals.²⁷

IX. UNLAWFUL EFFECTS AS NOT INEVITABLE

The United States argument that unlawful effects would not be *inevitable* begs the question. While the quantum of likelihood that must be present for unlawfulness to incept is not an issue that appears to have been broadly addressed or precisely defined in international law, there seems no basis for imposing a standard of inevitability.²⁸ The rules of discrimination, necessity, and proportionality are rules of reason designed to limit the use of weapons, before their use, based on their likely effects in light of applicable military factors. The rules of international law as to the *mens rea* or mental state necessary for war crimes culpability are inconsistent with the assumption that inevitability must be present before culpability incepts.

X. MENS REA

The lawfulness of our use of nuclear weapons involves issues as to such lawfulness *vis-à-vis* the United States as actor and *vis-à-vis* the United States civilian, military, industrial, and other leadership as actors. Ultimately, it is individuals, not States, who are imprisoned or executed.

The law is clear that strict intentionality is not required for criminal culpability for violation of the law of armed conflict. Willfulness,

23. See *id.* at ch. 2, nn. 104-06 and accompanying text.

24. See *id.* at ch. 2, nn.40, 42-46, 50-53, and accompanying text.

25. See *id.* at ch. 2, nn.48, 49, 57, 59, 67-69, 74, 88, and accompanying text.

26. See *id.* at ch. 2, nn.71-74, 89 and accompanying text.

27. See MOXLEY, *supra* note 13, at ch. 2, nn.57, 129, and accompanying text.

28. See *id.* at ch. 1, nn.161, 172, 282, 286, ch. 8, nn.6-53 and accompanying text.

recklessness, gross negligence, and even mere negligence are potential bases for culpability.²⁹ The actor need not have intended the unlawful effects from the use of nuclear weapons; it will potentially be a sufficient ground for war crimes culpability if he used such weapons notwithstanding the known risks—and the risks of nuclear use or certainly known today.

Thus, *The Air Force Manual on International Law* recognizes the sufficiency of gross negligence or deliberate blindness.³⁰ The manual quotes Spaight's statement of the rule:

In international law, as in municipal law intention to break the law—*mens rea* or negligence so gross as to be the equivalent of criminal intent is the essence of the offense. A bombing pilot cannot be arraigned for an error of judgment, it must be one which he or his superiors either knew to be wrong, or which was, *in se*, so palpably and unmistakably a wrongful act that only gross negligence or deliberate blindness could explain their being unaware of its wrongness.³¹

It is also clear that the law of armed conflict generally recognizes recklessness and other mental states less than strict intentionality as a basis for war crimes liability.³² The Geneva conventions extensively provide for criminal culpability for violations committed willfully,³³ a state of mind broadly recognized as encompassing recklessness.³⁴ The law of armed

29. See *id.* at ch. 1, nn.286, 289-95, and accompanying text, ch. 8 *passim*.

30. THE AIR FORCE MANUAL ON INT'L LAW, *supra* note 2, at 15-3, 15-8 n.3 (citing SPAIGHT, AIR POWER AND WAR RIGHTS 57, 58 (1947)).

31. *Id.* at 15-8, n.13.

32. See MOXLEY, *supra* note 13, at ch. 8, nn.6-15 and accompanying text. See generally *id.* ch 8.

33. See *id.* ch. 8, nn.8-14 and accompanying text; THE AIR FORCE MANUAL ON INT'L LAW, *supra* note 2, at 15-1 to 15-2, 15-8 n.12 (quoting the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted Aug. 12, 1949, 75 U.N.T.S. 85, and other Geneva Conventions).

34. See MOXLEY, *supra* note 13, at ch. 8, nn.6-18 and accompanying text. See generally *id.* ch. 8. See also GLANVILLE L. WILLIAMS, CRIMINAL LAW, THE GENERAL PART § 22, 59-62 (1953); Amnesty International—Report—IOR 40/10/98 May 1998 U.N., The International Criminal Court Making the Right Choices—Part V Recommendations to the Diplomatic Conference, available at <http://www.web.amnesty.org/ai.nsf/index/IO400101998> (last visited Feb. 8, 2002) (quoting ICRC Commentary to article 85 of Protocol I (¶. 3474)); Commentary on Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Part V: Execution of the Conventions and of this Protocol #Section II—Repression of Breaches of the Conventions and of

conflict similarly recognizes criminal culpability for acts of wantonness and of wanton destruction, acts also not reaching the level of strict intentionality.³⁵

Similarly, in imposing war crimes culpability for “an attack which may be expected to cause” certain impermissible effects, as prescribed, for example, in Protocol I to the Geneva Conventions, Article 51(5), or for acts that are “intended, or may be expected, to cause” certain impermissible effects, as prescribed, in Protocol I, Article 35(3), the law again recognizes potential culpability for war crimes committed with a mental element of less than strict intentionality.³⁶

So also, the law of armed conflict recognizes an extremely scope of potential commander culpability for war crimes based on what the commander “knew or should have known.”³⁷

While the ICJ in the Nuclear Weapons Advisory Opinions did not focus on the question of the general *mens rea* requirements under the law of armed conflict, a number of the judges made the point that information as to the potential effects of nuclear weapons is so widely known and available as to provide a basis for war crimes based on the use of such weapons. Judge Weeramantry, in his dissenting opinion, stated:

["By-products" or "collateral damage"] are known to be the necessary consequences of the use of the weapon. The author of the act causing these consequences cannot in any coherent legal system avoid legal responsibility for causing them, any less than a man careening in a motor vehicle at a hundred and fifty kilometers per hour through a crowded market street can avoid responsibility for the resulting

this Protocol, art. 85—Repression of breaches of this Protocol, *available at* <http://www.icrc.org/ihl.nsf> (last visited Feb. 7, 2002).

35. See International Criminal Tribunal for the Former Yugoslavia, Statute of the International Tribunal (Adopted May 25, 1993) (as amended May 13, 1998), art. 3(b), *available at* <http://www.un.org/icty/basic/statut/statute.htm>; Jordan J. Paust, *The Preparatory Committee's "Definition of Crimes"—War Crimes*, 8 CRIM. L.F. 431, 438-41 (1997) (emphasis omitted) (citing, *inter alia*, U.N. Doc. A/CONF. 95/15 (1980), *reprinted in* 19 I.L.M. 1523); Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 & Add. 1 (1993), Annex, arts. 2(d), 3(b); Prosecutor v. Karadzic, pp.27, 41, 44 (1995) (Indictment, Int'l Trib. for Former Yugo.), *available at* <http://www.un.org/icty/indictment/english/kar-ii950724e.htm>; CARNEGIE ENDOWMENT FOR INT'L PEACE, REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES CONFERENCE OF PARIS, LISTS OF WAR CRIMES (1919).

36. Paust, *supra* note 35, at 438-41 (emphasis omitted) (citations omitted).

37. *Id.* (citing, *inter alia*, 11 TRIALS OF WAR CRIMINALS 757 (1948)).

deaths on the ground that he did not intend to kill the particular person who died.³⁸

Judge Weeramantry added, "The plethora of literature on the consequences of the nuclear weapon is so much part of common universal knowledge today that no disclaimer of such knowledge would be credible."³⁹

To the argument that the rule of moderation—the prohibition of the use of arms "calculated to cause unnecessary suffering"—requires specific intent, Judge Weeramantry cited the "well-known legal principle that the doer of an act must be taken to have intended its natural and foreseeable consequences."⁴⁰ He also stated that reading into the law a requirement of specific intent would not "take into account the spirit and underlying rationale of the provision—a method of interpretation particularly inappropriate to the construction of a humanitarian instrument."⁴¹

Making a point that, as we saw above, is confirmed by the United States' military manuals,⁴² Judge Weeramantry added that nuclear weapons "are indeed deployed 'in part with a view of utilizing the destructive effects of radiation and fall-out.'"⁴³

As noted above, Judge Weeramantry reached a similar conclusion with respect to the rights of neutrals: "The launching of a nuclear weapon is a deliberate act. Damage to neutrals is a natural, foreseeable and, indeed, inevitable consequence."⁴⁴

Judge Weeramantry also emphasized the element of intent contained in the policy of deterrence: "Deterrence needs to carry the conviction to other parties that there is a real intention to use those weapons, it leaves the world of make-believe and enters the field of seriously-intended military threats."⁴⁵

38. Nuclear Weapons Advisory Opinion, *supra* note 12, at 901 (J Weeramantry, dissenting).

39. *Id.*

40. *Id.* at 904.

41. See MOXLEY, *supra* note 13, at ch. 3, note 313 and accompanying text.

42. See *id.* at ch. 29, notes 38–40, ch. 30 notes 14–22, and accompanying text.

43. Nuclear Weapons Advisory Opinion, *supra* note 12, at 904 (J Weeramantry, dissenting) (citing Ian Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L. Q. 445 (1965)); DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 13, at i, I-6-7 (emphasis omitted).

44. Nuclear Weapons Advisory Opinion, *supra* note 12, at 905 (J. Weeramantry, dissenting).

45. *Id.* at 919 (internal citations omitted).

Judge Weeramantry concluded that the policy of deterrence provides the element of intent:

[D]eterrence becomes stockpiling with intent to use. If one intends to use them, all the consequences arise which attach to intention in law, whether domestic or international. One intends to cause the damage or devastation that will result. The intention to cause damage or devastation which results in total destruction of one's enemy, or which might indeed wipe it out completely, clearly goes beyond the purposes of war.⁴⁶

The challenging aspect of the evaluation of the lawfulness of the use of nuclear weapons is the fact that—unlike the legal determinations made at Nuremberg or in war crime trials generally—with nuclear weapons it is obviously not a prudently available strategy to wait until after the weapons are used to make the evaluation. While war crimes charges seem to have rarely been brought based on risk taking that did not result in illicit effects, nuclear weapons pose a threat that requires full and effective advance evaluation and compliance if the applicable law is to be given effect.⁴⁷

That is perhaps the best way to conceptualize the nuclear threat: that the rules of the law of war applicable to nuclear weapons will be frustrated—in effect nullified—if they are not applied in advance.

XI. WAR CRIMES CULPABILITY UNDER GENERAL PRINCIPLES OF LAW

The law is clear that the rules of discrimination, proportionality and necessity are binding as established principles of international law. The United States is bound by these rules; if, under these rules, the use of nuclear weapons would be unlawful, the United States is bound by such unlawfulness. It is not necessary that it independently agree by convention, custom, or otherwise to such unlawfulness or even that it agree with the conclusion that the rules of discrimination, proportionality, or necessity render use unlawful.

The Air Force Manual on International Law thus states that the use of a weapon may be unlawful based not only on “expressed prohibitions

46. *Id.*

47. The need for prudence in planning in this area goes also to the need for adequate procurement of conventional weapons, so the United States will not find itself in a position of needing to use nuclear weapons. See MOXLEY, *supra* note 13, at ch. 1, nn.91-101, ch. 17, nn.29-36, 45-50, ch. 18 n.5 and accompanying text.

contained in specific rules of custom and convention," but also on "those prohibitions laid down in the general principles of the law of war."⁴⁸

Similarly, in discussing how the lawfulness of new weapons and methods of warfare is determined, the manual states that such determination is made based on international treaty or custom, upon "analogy to weapons or methods previously determined to be lawful or unlawful," and upon the evaluation of the compliance of such new weapons or methods with established principles of law, such as the rules of necessity, discrimination and proportionality.⁴⁹

The manual notes that the International Military Tribunal at Nuremberg in the case of the *Major War Criminals* found that international law is contained not only in treaties and custom but also in the "general principles of justice applied by jurists and practiced by military courts."⁵⁰

The Army's *Law of Land Warfare* states "[t]he conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten."⁵¹

Based on the foregoing, it seems clear that the use of nuclear weapons can be unlawful *per se* regardless of whether there is a treaty or custom establishing such unlawfulness.

XII. PREREQUISITES FOR A *PER SE* RULE

The question also arises as to what level or extent of unlawfulness must be present for a *per se* rule to arise. The United States contended,⁵² in a position that the ICJ ostensibly accepted *sub silentio*,⁵³ that one hundred percent illegality—the unlawfulness of all uses of nuclear weapons—would be necessary before a rule of *per se* illegality could arise.

48. THE AIR FORCE MANUAL ON INT'L LAW, *supra* note 2, at 6-1, 6-9 n.3. See also MOXLEY, *supra* note 13, at ch. 1, nn.14-18, 24, ch. 2, nn.42-49 and accompanying text.

49. See THE AIR FORCE MANUAL ON INT'L LAW, *supra* note 2, at 6-7; MOXLEY, *supra* note 13, at ch. 1, nn.25 and accompanying text.

50. THE AIR FORCE MANUAL ON INT'L LAW, *supra* note 2, at 1-6. See also MOXLEY, *supra* note 13, at ch. 1 n.26 and accompanying text.

51. UNITED STATES DEPT. OF THE ARMY, THE LAW OF LAND WARFARE 3 (FM27-10 July 18, 1956) with Change No. 1 (July 15, 1976) [hereinafter THE LAW OF LAND WARFARE]. See also MOXLEY, *supra* note 13, at ch. 1 n.3 and accompanying text.

52. See MOXLEY, *supra* note 13, at ch. 1, nn.314-20, ch. 2 n.26 and accompanying text; THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 6-3; THE NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 6, at 10-2; Op. I.C.J. (1995), Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat or Use of Nuclear Weapons, *supra* note 17, at 90.

53. See MOXLEY, *supra* note 13, at ch. 3, nn.237-45 and accompanying text; Nuclear Weapons Advisory Opinion, *supra* note 12, at 822, 823, 829; 937 (J. Higgins, dissenting), 915 (J. Weeramantry, dissenting).

To the extent one concludes, as I have, that all or “virtually all” uses of nuclear weapons would be unlawful, either because the resultant effects, particularly radiation and escalation, would be uncontrollable, or because any such use would be likely to precipitate impermissible effects, or would involve the risk of precipitating extreme impermissible effects, the issue of whether unlawfulness in one hundred percent or virtually one hundred percent of cases is required is not reached.

If one concludes, however, that the United States position—that some uses could potentially be lawful—has merit, one reaches the question of the prerequisites for a *per se* rule.

The ICJ ostensibly assumed that the use of nuclear weapons could be held *per se* unlawful only if all uses would be unlawful in all circumstances. This appears, for example, from the Court’s conclusions that it does not have sufficient facts to determine that nuclear weapons would be unlawful “in any circumstance,”⁵⁴ that the proportionality principle may not in itself exclude the use of nuclear weapons in self-defense “in all circumstances,”⁵⁵ and that, for the threat to use nuclear weapons implicit in the policy of deterrence to be unlawful, it would have to be the case that such use would “necessarily violate the principles of necessity and proportionality.”⁵⁶

However, the Court’s approach may have been affected by the wording of the question referred to it by the General Assembly: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”⁵⁷

This issue deserves more attention. There are numerous bases for inferring that, under widely accepted principles of law, a *per se* rule can arise under circumstances of less than one hundred percent applicability,⁵⁸ and that this is particularly appropriate where unlawfulness would exist in the vast majority of cases and the potential benefits of avoiding the repercussions of unlawful uses exceed the benefits of using such weapons in instances of putative lawfulness.⁵⁹ A number of the judges of the ICJ, in

54. Nuclear Weapons Advisory Opinion, *supra* note 12, at 829. See MOXLEY, *supra* note 13, at ch. 3, nn.9, 30, 43, 237, 245, 249, and accompanying text.

55. Nuclear Weapons Advisory Opinion, *supra* note 12, at 822. See MOXLEY, *supra* note 13, at ch. 3, nn.30, 62, 237-42, 303 and accompanying text.

56. Nuclear Weapons Advisory Opinion, *supra* note 12, at 823.

57. *Id.* at 811 (question presented to the Court by U.N. General Assembly resolution 49/75 K, adopted Dec. 15, 1994).

58. See, e.g., MOXLEY, *supra* note 13, at ch. 4, nn.3-13 and accompanying text.

59. See MOXLEY, *supra* note 13, at ch. 4, nn.3-5, 10, 25-31, 37-39, and accompanying text.

their individual opinions, addressed the issue. Judge Shahabuddeen stated, "[I]n judging of the admissibility of a particular means of warfare, it is necessary, in my opinion, to consider what the means can do in the ordinary course of warfare, even if it may not do it in all circumstances."⁶⁰

Judge Weeramantry, addressing the issue from the perspective of nuclear decision-making, concluded that nuclear weapons should be declared illegal in all circumstances, with the proviso that if such use would be lawful "in some circumstances, however improbable, those circumstances need to be specified."⁶¹ Judge Weeramantry stated:

A factor to be taken into account in determining the legality of the use of nuclear weapons, having regard to their enormous potential for global devastation, is the process of decision-making in regard to the use of nuclear weapons.

A decision to use nuclear weapons would tend to be taken, if taken at all, in circumstances which do not admit of fine legal evaluations. It will, in all probability, be taken at a time when passions run high, time is short and the facts are unclear. It will not be a carefully measured decision taken after a detailed and detached evaluation of all relevant circumstances of fact. It would be taken under extreme pressure and stress. Legal matters requiring considered evaluation may have to be determined within minutes, perhaps even by military rather than legally trained personnel, when they are in fact so complex as to have engaged this Court's attention for months. The fate of humanity cannot fairly be made to depend on such a decision.

Studies have indeed been made of the process of nuclear decision-making and they identify four characteristics of a nuclear crisis. These characteristics are:

1. The shortage of time for making crucial decisions. This is the fundamental aspect of all crises.

60. Nuclear Weapons Advisory Opinion, *supra* note 12, at 869 (J. Shahabuddeen, dissenting).

61. Nuclear Weapons Advisory Opinion, *supra* note 12, at 915 (J. Weeramantry, dissenting).

2. The high stakes involved and, in particular, the expectation of severe loss to the national interest.
3. The high uncertainty resulting from the inadequacy of clear information, *e.g.*, what is going on?, What is the intent of the enemy?; and
4. The leaders are often constrained by political considerations, restricting their options.⁶²

Judge Weeramantry further concluded that, even if there were a nuclear weapon that totally eliminated the dissemination of radiation and was not a weapon of mass destruction the Court, because of the technical difficulties involved, would not be able "to define those nuclear weapons which are lawful and those which are unlawful," and accordingly that the Court must "speak of legality in general terms."⁶³

Even using the United States formulation of requiring one hundred percent unanimity, there is room for "sub-classes" of *per se* unlawfulness. Based on the Court's decision, there is a basis for concluding that the use of strategic nuclear weapons and the wide scale use of tactical nuclear weapons or their use in urban areas, would be *per se* unlawful.⁶⁴ As far as equipment is concerned, this would ostensibly render unlawful the use of something on the order of eighty percent of the nuclear weapons in the United States' active arsenal. As far as circumstances are concerned, this would ostensibly render unlawful a very large portion of the instances in which the United States might use such weapons.

To the objection that such piecemeal illegalization would be incomplete or unworkable, the answer is that we already have something analogous in practice and that, in any event, social and political evolution, like chance in catastrophe theory,⁶⁵ work in sequential steps as well as jumps. Incrementalism in the right direction is not necessarily bad, and can be infinitely better than nothing, particularly if it is the most that is available at a particular point in time.

62. *Id.* (citing Conn Nugent, *How a Nuclear War Might Begin*, in PROCEEDINGS OF THE SIXTH WORLD CONGRESS OF THE INTERNATIONAL PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR 117).

63. *Id.* at 922. It is unclear whether Judge Koroma in his dissenting opinion, in concluding that the use of nuclear weapons would be unlawful "in any circumstance," was assuming that *per se* illegality required every possible use be unlawful. See *id.* at 925.

64. See MOXLEY, *supra* note 13, at ch. 3, nn.10-11 and accompanying text. See, *e.g.*, Nuclear Weapons Advisory Opinion, *supra* note 12, at 829, 835.

65. See MOXLEY, *supra* note 13, at ch. 22, nn.46-59 and accompanying text.

As to the workability of partial limitations, the United States has already undertaken numerous such limitations. In addition to the pledge not to use nuclear weapons against non-nuclear adversaries,⁶⁶ the United States has agreed not to use nuclear weapons, subject to certain conditions: in Latin America, pursuant to the Treaty of Tlatelolco of February 14, 1967;⁶⁷ in the South Pacific, pursuant to the Treaty of Rarotonga of August 6, 1985;⁶⁸ in Southeast Asia, pursuant to the Southeast Asia Nuclear-Weapon-Free Zone Convention of December 15, 1995;⁶⁹ in Africa, pursuant to the nuclear weapons free zone convention signed on April 1, 1996;⁷⁰ and in the Antarctic, pursuant to the Antarctic Treaty of 1959.⁷¹

So also, the United States, in its appearance before the ICJ in the Nuclear Weapons Advisory case, strongly reassured the Court that the United States doctrine of nuclear deterrence is purely of a defensive nature, such that the United States would never use such other weapons other than in a defensive mode.⁷²

It could be said that this issue as to the prerequisites for a *per se* rule is semantic, because many *per se* rules are themselves generally subject to exceptions and qualifications.⁷³ Nonetheless, on the assumption that law matters, it seems clear that, were the United States to recognize the *per se* unlawfulness of the use of nuclear weapons, in whole or in part, even if there were qualifications and footnotes to the recognition, a powerful step would have been taken.

XIII. RISK ANALYSIS

To what extent may any one State put protected persons and indeed the whole human venture at risk in an attempt to further the State's own military objectives, even its survival?

66. See *id.* ch. 30 n.75 and accompanying text.

67. See Nuclear Weapons Advisory Opinion, *supra* note 12, at 824. Other nuclear States imposed further limitations on their ratification of the Protocol. See MOXLEY, *supra* note 13, at ch. 3, nn.127-33 and accompanying text.

68. Nuclear Weapons Advisory Opinion, *supra* note 12, at 824-25.

69. See *id.* at 826.

70. See *id.*

71. See *id.* at 825.

72. See Op. I.C.J. (1995), Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat or Use of Nuclear Weapons, *supra* note 17, at 86. See also MOXLEY, *supra* note 13, at ch. 2, nn.130-35 and accompanying text.

73. See MOXLEY, *supra* note 13, at ch. 4, nn.3-5, 10-13, 16-30, 41-42, and accompanying text. See also *id.* ch. 30 n.151 and accompanying text.

In any such circumstance in which these weapons might be used, whether intentionally or by mistake, is it not ineluctably the case that there would be some risk of the occurrence of extreme effects, given the potential destructiveness of the weapons, the inherent uncontrollability of radiation,⁷⁴ and the overall potential for escalation, misperception, and loss of command and control?⁷⁵

This is clear, I submit, even from Judge Schwebel's example of the use of "tactical nuclear weapons against discrete military or naval targets so situated that substantial civilian casualties would not ensue."⁷⁶

The ICJ in its decision referenced similar arguments the United States and Great Britain had made:

91. . . . The reality . . . is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.⁷⁷

These examples, and the ones used by the United States and Great Britain before the ICJ, appear to assume one of two things: that the submarine in the ocean and the army in the desert or other such remote targets would exist independently of the rest of the world, rather than being affiliated with a State that either itself or with its allies has nuclear, chemical or biological weapons that it is likely to use in response to nuclear attack, and that the State using the nuclear weapons has no other

74. See *id.* ch. 29, nn. 41-124, and accompanying text.

75. See *id.* chs. 15, 25, 26, ch. 2, nn. 63-87, ch. 15, nn. 1-14, 33-43, 58-89, 99, 102-108, ch. 16, nn. 32-38, and accompanying text; NATO HANDBOOK ON THE MEDICAL ASPECTS OF NBC DEFENSIVE OPERATIONS, AMEDP-6(B), Part I, ch. 1, § 102(a) (1996) (adopted as Army Field Manual 8-9, Navy Medical Publication 5059, Air Force Joint Manual 44-151); Carl Sagan, *Nuclear War and Climatic Catastrophe: Some Policy Implications*, 62 FOREIGN AFF. 257, 273 (Winter 1983/1984). See also MOXLEY, *supra* note 13, at chs. 7-9, on weighing risks and the legal relevance of risks. The escalation is particularly extreme, as has been recognized by the civilian and military leadership of the United States and by defense experts throughout the nuclear era. See MOXLEY, *supra* note 13, at chs. 24, 25.

76. Nuclear Weapons Advisory Opinion, *supra* note 12, at 839 (J. Schwebel, dissenting).

77. *Id.* at 829 (citing United Kingdom, Written Statement ¶ 3.70 at 53 and United States of America Oral Statement, CR 95/34 at 89-90). See also MOXLEY, *supra* note 13, at ch. 1, n. 29 and accompanying text.

enemies that might find the attack provocative and retaliate; or that the potential escalation by the attacked State or other party is not relevant to the analysis.

Neither assumption seems reasonable. As the United States has recognized, the legality evaluation is to be made in light of all available facts as to potential risk factors.⁷⁸ Although it may be possible that there could be a scenario where the submarine or the army in the desert and the related conflict existed independently of the rest of the world, such a prospect seems so remote as to preclude its constituting the basis, on any rational level, for the overall lawfulness of the use of nuclear weapons.

Interestingly, Judge Schwebel recognized the legal point that if a use of nuclear weapons could cause severe effects, it would be unlawful:

At one extreme is the use of strategic nuclear weapons in quantities against enemy cities and industries. This so-called "countervalue" use (as contrasted with "counterforce" uses directly only against enemy nuclear forces and installations) could cause an enormous number of deaths and injuries, running in some cases into the millions; and, in addition to those immediately affected by the heat and blast of those weapons, vast numbers could be affected, many fatally, by spreading radiation. Large-scale "exchanges" of such nuclear weaponry could destroy not only cities but countries and render continents, perhaps the whole of the earth, uninhabitable, if not at once then through longer-range effects of nuclear fallout. It cannot be accepted that the use of nuclear weapons on a scale which would—or *could*—result in the deaths of many millions in indiscriminate inferno and by far-reaching fallout, have profoundly pernicious effects in space and time, and render uninhabitable much or all of the earth, could be lawful.⁷⁹

The ICJ, as we have seen, concluded that it had not been given sufficient facts to resolve the issue:

78. See MOXLEY, *supra* note 13, at ch. 1, nn.84-93, 109-120, 161, ch. 5, nn.3-4, ch. 6, nn.26-27, ch. 29, nn.125-127 and accompanying text; THE AIR FORCE MANUAL ON INT'L LAW, *supra* note 2, at 1-8, 1-9 (citing SPAIGHT, AIR POWER AND WAR RIGHTS 57, 58 (1947)); 11 INT'L ENCYCLOPEDIA OF COMP. LAW, *Torts* § 2-114 (1983).

79. Nuclear Weapons Advisory Opinion, *supra* note 12, at 839 (J. Schwebel, dissenting) (emphasis added). See MOXLEY, *supra* note 13, at ch. 1, n.38 and accompanying text.

95. . . . [N]one of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the "clean" use of smaller, low yield tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination of the validity of this view.⁸⁰

The Court declined to engage in risk analysis:

43. Certain States contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to inquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality.⁸¹

This issue of risk analysis would appear to be the heart of the matter. In a milieu in which the dominant policy of nuclear deterrence is inherently provocative, the question of the extent to which any State may subject the rest of the world, or any appreciable portion of it, to the risk of severe, even apocalyptic, effects would appear to be one that must be addressed if the law in this area is to be meaningful.

The applicability of risk analysis would seem to be recognized by the United States statement of the proportionality test to the ICJ:

80. Nuclear Weapons Advisory Opinion, *supra* note 12, at 829, 894. See also MOXLEY, *supra* note 13, at ch. 3, n.31 and accompanying text.

81. Nuclear Weapons Advisory Opinion, *supra* note 12, at 822. See also MOXLEY, *supra* note 13, at ch. 6, n.8 and accompanying text; Nuclear Weapons Advisory Opinion, *supra* note 12, at 819, 821, 822, 829, 830.

Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians.⁸²

XIV. DEFERRED LEGAL EVALUATION AS RISKING ABNEGATING THE RULE OF LAW

Our current approach that each potential use of nuclear weapons must be evaluated in the context of the particular use has the effect of largely vitiating the rule of law. In the circumstances of a war where nuclear weapons might be resorted to, the situation will likely be extremely volatile; the fog of war will be thick (maybe even thicker than in wars of the past, given the extent to which we are dependent on computer controls); information will be incomplete and possibly inaccurate; passions will be high; time will be short. The likelihood of reasoned application of the law of armed conflict will be slight.

Our failure to come to grips with these the legal issues of nuclear weapons now puts not just the rule of law but the continuation of human civilization at risk. The United States is the indispensable leader; it alone can start the process of change in this area.

Not by expecting quick success. Not by expecting a situation in which we can quickly rid ourselves of these weapons or expect other nuclear States to do so—but committing ourselves to a process that, in perhaps our children's or grandchildren's time, will see the delegitimization of these weapons and progress on the road to ridding the world of them.

XV. UNLAWFULNESS OF SECOND USE/REPRISALS

The concept of reprisal is one of justifying actions that would otherwise be unlawful. But the United States recognizes as a requirement for lawful reprisal that the strike be limited to that necessary to force the adversary to cease its unlawful actions and that it satisfy proportionality.⁸³ If my factual conclusion is correct that the effects of nuclear weapons are uncontrollable, it would seem that lawful reprisal would not be possible.

82. See MOXLEY, *supra* note 13, at ch. 1, nn.75-108, ch. 2, nn.88-91 and accompanying text.

83. See MOXLEY, *supra* note 13, at ch. 29, nn.227-42 and accompanying text (discussion of the application of the law of reprisal to nuclear weapons).

The probabilities are overwhelming that the second use would be designed to punish the enemy and, not incidentally, in the case of a substantial nuclear adversary, to use one's own nuclear assets before they could be preemptively struck by the adversary, and to attempt to preemptively strike the adversary's nuclear assets (many of which would likely be "co-located" with civilian targets) before they could be used. Even assuming adequate command and control, crucial decisions would have to be made within a very short time and would likely be dictated largely by existing war plans contemplating nuclear weapons use. The notion of a second strike as limited to the legitimate objectives of reprisal seems oxymoronic.

In addition, the United States, while it disputes the applicability to nuclear weapons of the limitations upon reprisals imposed by Protocol I,⁸⁴ recognizes that the law of armed conflict, including that as to reprisals, is subject to the limitations inherent in the purposes of the law of armed conflict, such as preserving civilization and the possibility of the restoration of the peace, purposes that would likely be exceeded by the use of nuclear weapons.

Even if it were assumed that certain second uses of nuclear weapons, although otherwise unlawful, might be legitimized as reprisals, such legitimization—like the lawfulness of the limited use of a small number low-yield nuclear weapons in remote areas asserted by the United States before the ICJ—would only affect a small portion of the potential uses for nuclear weapons contemplated by United States policy and planning. It would leave unaffected the unlawfulness of the vast bulk of potential uses and virtually the totality of *likely* possible uses, including first uses against conventional, chemical and biological weapons targets, second uses intended to defeat and destroy the enemy, disproportionate second uses, and other high-megatonnage nuclear strikes with likely extreme effects.

XVI. OUR NATIONAL INTEREST

Paradoxically, all of this is in even our short term interest. We no longer need these weapons. Not only do they pose more of a risk than a solution to any military threat. We can in fact, with our greatly expanded conventional weapons and particularly with the precision with which we can deliver payloads, now achieve with conventional weapons potentially all of the military missions for which we might previously have considered resorting to nuclear weapons.

84. See *id.* ch. 1, nn.274-77 and accompanying text; ch. 2, nn.127-129 and accompanying text. See also ch. 3, nn.246-249 and accompanying text.

I submit that virtually any use of nuclear weapons would be unlawful, and that the lessons of September 11th should unify us in a broad determination to the delegitimization of all uses of weapons threatening terroristic effects.

SCIENTIFIC RESEARCH WHALING IN INTERNATIONAL LAW: OBJECTIVES AND OBJECTIONS

*Howard S. Schiffman**

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I. INTRODUCTION

Scientific research whaling is one of the most hotly debated points of contention between anti-whaling forces and those few remaining states that seek to resume commercial whaling. While the justification for scientific whaling in international law needs to be carefully considered, so, too, must one understand the political and economic motivations underlying the practice. This paper is a brief overview of the legal, political and economic context of scientific research of whaling in the world today.

Research whaling programs do not exist in a vacuum. On the contrary, scientific whaling is intimately bound up with the status of commercial whaling. The legacy of commercial whaling is one of the saddest examples of resource overexploitation in human history. Whales (cetaceans) were hunted for centuries without regard for the maintenance of healthy stocks.¹ With many important commercially valuable species

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1. For a review of the history of commercial whaling, see Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 BROOK. J.

depleted, the whaling states sought to create an international legal framework for whale harvesting. The product was the 1946 International Convention for the Regulation of Whaling (ICRW).² The primary achievement of the ICRW was the establishment of the International Whaling Commission (IWC) as an organization responsible for the stewardship of whale stocks and the whaling industry.³ The IWC is comprised of representatives of each member state of the ICRW⁴ and it remains the most significant international organization devoted to whale conservation and management.

The most salient responsibility of the IWC is that it may amend the provisions of the ICRW's Schedule (of catch-limits) by adopting regulations with respect to the conservation and utilization of whale resources.⁵ The amendments of the Schedule "shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development and optimum utilization of whale resources."⁶ The amendments of the Schedule also "shall be based on scientific findings."⁷

II. THE INTERNATIONAL WHALING COMMISSION AND SCIENTIFIC WHALING

In addition to the powers of the IWC to regulate commercial whaling, the ICRW conferred upon member states the power to grant their nationals special permits to harvest whales for scientific purposes. Article VIII of the ICRW provides as follows:

1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government

INT'L L. 303 (1996); Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991); DAVID DAY, *THE WHALE WAR* (1987).

2. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW].

3. See *id.* at art. III. The International Whaling Commission (hereinafter IWC) remains the most significant intergovernmental organization devoted to cetacean conservation and management.

4. *Id.* at art. III(1).

5. *Id.* at art. V(1).

6. *Id.* at art. V(2)(a).

7. *Id.*

thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.⁸

2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance to directions issued by the Government by which the permit was granted.⁹

In 1982, faced with the catastrophic results of its inability to provide for the recovery of whale stocks the IWC voted to phase in a moratorium, or zero catch-limit, on commercial whaling subject to annual review.¹⁰ The moratorium was largely predicated on the scientific uncertainty and inability to accurately assess stock populations.¹¹

Despite the moratorium on commercial whaling, scientific research whaling, along with aboriginal subsistence whaling,¹² continued to be permitted. Without question, the state at the forefront of the practice of scientific whaling is Japan. Not surprisingly, Japan is also a stalwart whaling state; one of the few seeking to overturn the moratorium and resume commercial whaling. Japan's vigorous research whaling program has raised questions about whether these activities are merely a way to circumnavigate the present commercial moratorium.¹³ Japan has countered this with the argument that these specially designated scientific catches are

8. *Id.* at art. VIII(1).

9. *Id.* at art. VIII(2).

10. See INTERNATIONAL WHALING COMMISSION, THIRTY-THIRD REPORT OF THE INTERNATIONAL WHALING COMMISSION 20-21 (1983) [hereinafter THIRTY-THIRD REPORT OF THE INTERNATIONAL WHALING COMMISSION].

11. *Id.* One of the factors that weighed in favor of the moratorium was a letter by then-President Ronald Reagan expressing concern over the insufficient data on whale stocks. See President's Message to the International Whaling Commission, 1981 PUB. PAPERS 634 (JULY 1981).

12. ICRW, *supra* note 2, Schedule at para. 13. Aboriginal subsistence whaling, along with scientific research whaling are two of most contentious issues in international marine mammal policy.

13. See International Whaling Commission, *The IWC, Scientific Permits and Japan*, at <http://www.iwcoffice.org/sciperms.htm> (last visited Nov. 10, 2001) [hereinafter *The IWC, Scientific Permits and Japan*].

essential to obtain information necessary for rational management and other important research needs.¹⁴

III. OBJECTIONS TO JAPANESE SCIENTIFIC RESEARCH WHALING

The controversy over Japan's research catches largely stems from three key points: 1) the lethal nature of the research program; 2) the size and unilateral nature of its research catch; and, 3) the ultimate commercial sale of whale products derived from the scientific hunts.

The ultimate decision on whether or not a scientific permit shall be issued is up to the individual member state and not the IWC.¹⁵ This unilateral decision includes the manner in which the research is conducted, however, the Scientific Committee of the IWC reviews proposals for permits in each case.¹⁶ The Scientific Committee's review focuses upon:

- (1) whether the permit adequately specifies its aims, methodology and the samples to be taken;
- (2) whether the research is essential for rational management; the work of the Scientific Committee or other critically important research needs;
- (3) whether the methodology and sample size are likely to provide reliable answers to the questions being asked;
- (4) whether the questions can be answered using non-lethal research methods;
- (5) whether the catches will have an adverse effect on the stock;
- (6) whether there is the potential for scientists from other nations to join the research programme.¹⁷

Applying these criteria to Japan's programs, some of the key objections are apparent. Japan currently maintains three (3) main research

14. *Id.*

15. ICRW, *supra* note 2, at art. VIII(1). For the full text of Article VIII(1), see *supra* text in Section II at note 8.

16. See *The IWC, Scientific Permits and Japan*, *supra* note 13.

17. *Id.* The Scientific Committee is comprised of over 120 scientists, some nominated by member governments and others invited especially by the Committee itself. The Committee inevitably includes the scientists proposing the scientific permit. *Id.*

whaling programs, one in Antarctica and two (2) in the North Pacific (one North Pacific program focuses specifically on the western North Pacific).¹⁸ Their scientific catch in each of these programs involves the death of a significant number of whales.

A. *The Research is Lethal*

In the year 2000, Japan's scientific catch included approximately 400 minke whales in the Antarctic region, approximately 100 minke whales, 50 Bryde's whales and 10 sperm whales in the western North Pacific.¹⁹ Whenever the whales die for the purpose of the scientific research it is referred to as lethal, or consumptive research. Japan's fisheries industry maintains the objectives of these lethal catches are to study the population, structure, feeding ecology and pollutant levels in these chosen whale species.²⁰

Despite Japan's assertions about the necessity of the research and their vehement arguments for the ability of the minke stocks to sustain the research catch, the IWC has expressed strong reservations on these very grounds. At the 2001 meeting of the IWC, two salient resolutions were adopted strenuously urging Japan to refrain from the lethal taking of whales in the Southern Ocean Sanctuary (Antarctica) and the Northern Pacific. In Resolution 2001-7 the IWC strongly urged Japan to halt the lethal take of minke whales conducted under the Antarctic program until the Scientific Committee reports on the impact of the research on the minke stocks.²¹

In Resolution 2001-8 the IWC strongly urged Japan to reconsider its lethal scientific catch in the North Pacific as it was unconvinced that Japan's objectives could not be achieved by non-lethal means and the

18. *Id.* The research whaling program in the Antarctic waters is particularly troublesome to anti-whaling advocates because the IWC has designated the Antarctic as a Southern Ocean Sanctuary which theoretically offers whales protection distinct from, and above and beyond, the present moratorium. Although Japan maintains an objection to the Southern Ocean Sanctuary, if a Sanctuary is in place, are further data needed on stock populations in those protected waters? *Id.*

19. *The IWC, Scientific Permits and Japan*, *supra* note 13.

20. See Press Release, Japan Whaling Association Website, *Media Release by Japan's Fisheries Agency: Japan Responds to Criticism of its Whale Research Program*, (Aug. 3, 2000), available at <http://www.jp-whaling-assn.com/banner1.htm>. [hereinafter *Japan Responds to Criticism*].

21. See International Whaling Commission, *Resolution 2001-7 of the IWC, Resolution on Southern Hemisphere Minke Whales and Scientific Permit Whaling*, available at <http://www.iwcoffice.org/Resolutions2001.htm> (last visited November 11, 2001).

objectives themselves did not rise to the level of justifying lethal research.²² These resolutions from the IWC's 2001 meeting follow-up on key resolutions adopted in 1999 and 2000 requesting the Scientific Committee to advise the IWC on proposed research programs as to whether the information sought in the research program under each special permit is: required for the purposes of management of the species or stock being researched; and, whether the information sought could be obtained by non-lethal means.²³

Understanding the feeding patterns and diet of whales is often raised as a research objective that can be realized through non-lethal research. Even if this was not the case, however, the use of such information by pro-whaling states is suspect. With greater frequency, Japan and other pro-whaling states have argued that the recovery of some species, coupled with their voracious appetites for commercially valuable fish stocks is positive proof of the need to resume whaling operations. In other words, some species of whale are now so plentiful and rapacious that they threaten other valuable ocean resources, such as some commercial fish stocks, and it is therefore necessary to cull the herd.²⁴ This argument is understandably

22. See *id.* Resolution 2001-8 of the IWC, *Resolution on JARPEN II Whaling in the North Pacific*. The JARPEN II is Japan's research whaling program in the western North Pacific. Resolution 2001-8 is similar to others from previous years expressing the identical concern for the necessity of lethal research. Most particularly, in Resolution 1995-9 the IWC recommended that scientific research involving the killing of cetaceans should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques. For a reference to Resolution 1995-5 see *The IWC, Scientific Permits and Japan*, *supra* note 13. For a discussion of the overall ethics of lethal research whaling, see Alexander Gillespie, *Whaling under a Scientific Auspice: The Ethics of Scientific Research Whaling Operations*, 3 J. INT'L WILDLIFE L. & POL'Y 1 (2000).

23. Resolution 1999-2 of the IWC, *Resolution on Special Permits for Scientific Research* (IWC/51/48 Rev.). The full text of Resolution 1999-2 is reproduced on the Journal of International Wildlife Law & Policy Website at <http://www.eelink.net/~asilwildlife/cet2.html>. In fact, the IWC has repeatedly passed resolutions expressing concern and recommending caution in the practice of scientific whaling. In particular, at the 47th meeting, the IWC adopted Resolution 1995-9, which "recommended that scientific research involving the killing of cetaceans should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and or/use of non-lethal techniques" IWC Resolution 1995-9. In 2000, Resolution 2000-4 and 2000-5 condemned Japan's Antarctic and Pacific programs on that basis. See generally the IWC's website at <http://www.iwcoffice.org/>.

24. See The Whale and Dolphin Conservation Society Website [hereinafter WDCCS Website], *Why We Do Not Need to Cull Whales to Protect Fish* (visited November 13, 2001), <http://www.wdcs.org/dan/publishing.nsf/allweb/B1B776DDB9DB8D2680256A370033A60B>. The Japan Whaling Association suggests that the amount of fish consumed by whales is problematic. See *Japan Responds to Criticism*, *supra* note 20. "It is becoming clear that whales are eating 3 to 5 times of marine living resources than fisheries catch by humans [sic]."

controversial and will continue to be the subject of scientific and policy debate.²⁵

Environmentalists have argued that at least part of Japan's research objectives could be achieved through non-lethal means such as biopsy techniques to assess stock identity.²⁶ They maintain that Japan has not seriously investigated non-lethal substitutes because the costs of non-lethal research cannot be recouped by the sale of whale products.²⁷ As a result of these objections, the United States, has seriously criticized Japan's ongoing lethal scientific program. Former-President Bill Clinton, for example, sent a letter to Congress in January 2001, where he expressed concern that Japan was expanding its research program to include sperm and Bryde's whales.²⁸ Clinton also noted that Japan's "research whaling activities diminish the effectiveness of the (IWC) conservation program."²⁹ President George W. Bush continued the U.S. objection. In May 2001, the State Department openly criticized Japan's continuing lethal research operations in the North Pacific.³⁰

While observers of research whaling may honestly debate the scientific value of the data generated by Japan's programs, any scientific utility must be balanced with both the environmental and legal impact of

Research with the objective of discovering the diet and feeding patterns of certain species is often referred to as prey consumption or prey preference research.

25. See Jock W. Young, *Do Large Whales Have an Impact on Commercial Fishing in the South Pacific Ocean*, 3 J. INT'L WILDLIFE L. & POL'Y 253 (2000) (concluding that despite high consumption, dietary overlap with commercial fish species appears to be relatively low, although direct data on the matter is limited).

26. See, WDCS Website, *Japan's Scientific Whaling* (visited November 12, 2001) <http://www.wdcs.org/dan/publishing.nsf/allweb/84A8B79F42BEB580802569070055CB80> [hereinafter *Japan's Scientific Whaling*]. On the other hand, it is clear that some data such as the age of an animal and the reproductive status of females can only be obtained through lethal means. See *The IWC, Scientific Permits and Japan*, *supra* note 13.

27. WDCS Website, *Japan's Scientific Whaling*, *supra* note 26. For a discussion of the sale of whale products derived from Japan's scientific programs see *infra* text accompanying notes 44-51.

28. See *Washington File*, U.S. Dept. of State, January 2, 2001, Text: Clinton Letter to Congress on Japan's Whaling Practices, 3 J. INT'L WILDLIFE L. & POL'Y 311 (2000).

29. *Id.* The particular wording invoked by President Clinton is significant in that it tracks the language of the Pelly and Packwood-Magnuson Amendments which provide for sanctions against states that "diminish the effectiveness of" international fishery and whale conservation programs. See Pelly Amendment to the Fisherman's Protective Act of 1976, 22 U.S.C. § 1978 (1994); Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1821 (1994).

30. See Press Statement of Richard Boucher, United States Department of State, *U.S. Opposes Renewed Japanese Whaling in the North Pacific* (May 14, 2001), available at <http://www.state.gov/g/oes/rls/prsr/2001/index.cfm?docid=2870>.

the lethal research. The next section considers the legal consequences that flow from the substantial size of the Japanese scientific catch.

B. A Large Unilateral Research Catch is not Justifiable

Assuming the species targeted by the Japanese programs—minkes, sperm and Bryde's—are robust enough to sustain a lethal research catch (a matter of some debate among IWC members), we are still left with other genuine questions as to whether the scale of the Japanese research programs runs afoul of other meaningful legal limitations. The large scale³¹ and unilateral nature of the research raises one such objection. While both the size of the research catch and its unilateral character could easily be considered independently, combined they form a compelling synergy. Therefore, it is instructive to consider them together.

Where a single state removes hundreds of whales from ocean space in furtherance of research objectives promulgated only by that state, such action might constitute a violation of the law of the sea governing marine scientific research. The 1982 United Nations Convention on the Law of the Sea (UNCLOS)³² is not only the framework agreement governing virtually all aspects of ocean usage, it is also one of the most significant achievements in international law in the twentieth century. One of the many innovations of UNCLOS is Part XIII governing marine scientific research.³³ In particular, Article 241 of UNCLOS provides that: "[m]arine scientific research shall not constitute the legal basis for any claim to any part of the marine environment or its resources."³⁴ Since the Japanese scientific whaling programs are not only lethal, but also unilateral and consumptive of a significant number of cetaceans, one can easily see the basis for a violation of Article 241. Simply put, Japan is laying claim to hundreds of whales every year in the name of scientific research while it is doing so to the exclusion of other states' enjoyment of those same cetacean resources.

31. *Id.* For information on the size of the year 2000 Japanese research catch and the species affected see *supra* text accompanying note 19.

32. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

33. *Id.* at Part XIII. Part XIII is entitled, "Marine Scientific Research" and is comprised of 28 articles addressing numerous aspects of marine scientific research including international cooperation, conduct and promotion, installations and equipment and responsibility and liability. *Id.*

34. *Id.* at art. 241.

Although it is true that Japan has called upon other states to conduct similar studies,³⁵ the Japanese programs are nevertheless unilateral undertakings. Most significantly, the ultimate sale of whale meat from the scientific catch in the Japanese markets³⁶ highlights the particular Japanese interest in the large number of whales killed for research purposes. While the key question of whether Japan's research objectives could be achieved through a smaller catch is ultimately one for scientists and statisticians, Japan can partially respond to objections to the size of its research programs with the counter-argument that a larger sample of whale specimens will likely yield more accurate data and more reliable scientific conclusions. This counter-argument, of course, assumes in the first instance the ability of minke, Bryde's and sperm stocks to absorb the number of whales taken for research purposes.

More compellingly, as previously noted, the essence of Article VIII of the ICRW is to allow individual states to unilaterally issue special permits to their nationals for the purpose of conducting scientific research.³⁷ In addition, the ICRW also clearly contemplates the use of whale resources that are not directly related to scientific purposes under the direction of the state issuing the permit.³⁸ As with all treaty rights, however, the rights conferred by Article VIII must be exercised in good faith and in a manner not prejudicial to the interests of other IWC members.³⁹ Furthermore, the provisions of UNCLOS, a later treaty, specifically addressing marine scientific research would suggest that the interests of other states should temper research upon a common marine resource.

In addition, any discussion of cetaceans in the context of UNCLOS must include the special status which the drafters of UNCLOS saw fit to confer upon them. The treatment of marine mammals, cetaceans in particular, under UNCLOS unquestionably set them apart as a resource deserving special attention and consideration. Article 65 states:

35. See Japan Whaling Association Website, *Japan Responds to Criticism*, *supra* note 20.

36. *Id.* For a more detailed analysis of this particular objection see *infra* section III(C).

37. See *supra* text in section II at note 8.

38. See *supra* text accompanying note 9. For a more complete discussion of the right to dispose of whale meat generated by research catches see *infra* text accompanying notes 46-48.

39. For a thought-provoking article on whether the Japanese practices under the scientific whaling exception rises to the level of an "abuse of right" see Gillian Triggs, *Japanese Scientific Whaling: An Abuse of Right or Optimum Utilization?* 5 ASIA PAC. J. ENVTL L. 33 (2000). Triggs concludes that the question of whether Japan's activities constitute "an abuse of right to conduct scientific whaling will depend upon the evidence regarding the primary purposes of the right, the significance of the research and the scale of any commercial activities." *Id.*

[n]othing in this Part restricts the right of a coastal state or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.⁴⁰

Article 65 appears in Part V of UNCLOS entitled, "Exclusive Economic Zone."⁴¹ Article 120 extends the provisions of Article 65 to the High Seas (international waters).⁴² An interpretation of these key UNCLOS provisions would strongly suggest that conservation, not consumption or utilization, is the weightier objective in the case of cetaceans. This contrasts with clearer provisions for utilization of other marine resources. Most significantly, Article 65 highlights the necessity of cooperation with international organizations to further the goals of conservation, management and study. Such a requirement would certainly seem to limit a large-scale scientific operation where the appropriate organization has condemned the scientific programs in the first instance and established guidelines disfavoring lethal research.

As previously noted, the UNCLOS provisions specifically pertaining to marine scientific research directly inform any marine research activities.⁴³ The UNCLOS marine scientific research regime, coupled with Articles 65 and 120 would seem to set a high bar for any ongoing, large-scale, lethal scientific whaling activities conducted by a single state.

C. The Whale Meat from Scientific Research Catches is Sold for Profit

Of all the criticisms of the Japanese scientific program, the ultimate commercial sale of whale products derived from the scientific catches has perhaps generated the loudest objection by anti-whaling advocates. In their view, this fact exposes the scientific program as a subterfuge; that is, commercial whaling is simply being repackaged and sold in the name of

40. UNCLOS, *supra* note 32, at art. 65.

41. *Id.* at Part V. The Exclusive Economic Zone (hereinafter EEZ) is an area beyond and adjacent to a state's territorial waters where it may exercise its rights and jurisdiction for the purpose of exploring and exploiting, conserving and managing, the natural resources found there.

42. *Id.* at art. 120.

43. *See supra* notes 33 and 34 and accompanying text.

science. Cynicism aside, the practice of scientific whaling raises some genuine questions about motivations and whether an unstated goal of the research is to hold the place of the commercial whaling industry until such time as the present moratorium can be overturned.

It is no secret that whaling states maintain that the IWC has failed in its mandate to provide for the proper stewardship of the whaling industry as provided for in the ICRW.⁴⁴ Similarly, it should be no surprise that an objective of scientific whaling is the establishment of parameters for an ultimate resumption of commercial whaling. Such resumption, in the view of whaling states, would be perfectly consistent with a consumptive application of sustainable utilization of cetacean resources.⁴⁵

On the other hand, anti-whaling advocates point to the fact that whale products derived from scientific catches, whale meat in particular, is regularly sold in commercial markets.⁴⁶ For example, the Whale and Dolphin Conservation Society protested the commencement of Japan's 2001 scientific whaling season in the Antarctic by highlighting the ultimate sale of the whale meat from the catch.⁴⁷

Japan's response to this criticism can be found in the text of the ICRW itself. Article VIII(2) indeed indicates that whale products taken under special permits shall be processed and the proceeds shall be dealt with in accordance with directions issued by the government who granted the permit. A plain reading of this provision demonstrates the wide discretion accorded the issuing government in the disposition of whale

44. See WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* 288-289 (1994). The preamble to the ICRW clearly designates the interests of the whaling industry as an objective of the treaty. "Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry[.]" ICRW, *supra* note 2, at Preamble.

45. For arguments on how the Japanese whaling industry hopes to proceed in the future from a model of sustainable utilization see INSTITUTE OF CETACEAN RESEARCH, *WHALING FOR THE TWENTY-FIRST CENTURY* (1996). The Institute of Cetacean Research is a nonprofit research organization whose legal status is authorized by the Japanese Ministry of Agriculture, Forestry and Fisheries. For a particular criticism of the role of the Institute of Cetacean Research see *infra* text accompanying note 48.

46. See WDCS Website, *Action Alert—Protest at Japan's New Whaling Season*, at <http://www.wdcs.org/dan/publishing.nsf/allweb/3B8B075EDF0DCB6E80256AFE0037B558> (visited November 29, 2001) [hereinafter *Action Alert*]. The WDCS is a global non-governmental organization dedicated to the conservation of whales and dolphins and their habitats.

47. *Id.* The WDCS criticism is supported by scholarly skepticism of Japan's motivations. Professor Gillian Triggs raises the question of whether "[t]he JARPA programme appears to camouflage the harvesting of whales for the Japanese commercial market so that the issue of special permits is a sham and in bad faith." Triggs, *supra* note 39, at 37 (citing Sara L. Ellis, *Japanese Whaling in the Antarctic: Science or Subterfuge?* 31 *OCEANUS* 68-69 (1988)).

products not used directly for research. The Japanese government has indicated that the commercial distribution of the whale meat from the scientific catch, required by the ICRW, ensures that whale resources are not wasted.

Anti-whaling advocates, on the other hand, expand their case against scientific whaling beyond the textual language of the ICRW. In an effort to demonstrate an unbroken link between scientific whaling and commercial whaling, conservation forces point to the source of funding for the research program. In particular, they cite the central role of the Institute of Cetacean Research: a private institute established with a grant from the whaling industry and subsidized by the Japanese government.⁴⁸

Questions of motivations and funding aside, robust and active scientific whaling by a single government certainly seems to hold the economic and political space of the commercial whaler during the time of the moratorium, even if it is not a direct circumnavigation of the moratorium.

IV. CONCLUSIONS

Until anti-whaling advocates are successful in securing a permanent ban on commercial whaling or whaling states are successful in repealing the present moratorium, the matter of scientific research whaling will continue to be contentious in law and policy. Although Japan is currently the only state actively pursuing scientific whaling, its exercise of the scientific whaling exception provided for in the ICRW is a bellwether for the status of the whalers during a time of strong anti-whaling sentiment within the IWC. Japan lawfully asserts its treaty right to conduct scientific whaling operations. Such operations, however, must be viewed in the context of a number of obligations in international law that may limit an extensive exercise of that right.

Japan's heavy emphasis on lethal research is strongly criticized by the IWC and does not comply with guidelines set forth by that body. While these guidelines may not themselves establish binding obligations, the resolutions of the IWC, as a competent international organization, deserve consideration. Importantly, the lethal nature of the research, the large size of the experimental catch and the fact that the research is conducted unilaterally may rise to the level of a claim that Japan is not fully cooperating with the work of the IWC. In addition, these facts support arguments that Japan has unlawfully and unfairly laid claim to these cetacean resources to the exclusion of other states. Such contentions arise

48. See WDCS Website, *Action Alert*, *supra* note 46.

from specific obligations in UNCLOS relating to cetaceans and marine scientific research.

Finally, the commercial sale of whale meat derived from scientific catches, although provided for in the ICRW, raise questions of motive. Is the purpose behind large-scale lethal scientific research the generation of useful data to be shared openly and in good faith in international discourse? Or, on the other hand, is it simply a way to circumnavigate the current moratorium on commercial whaling and preserve the status of the Japanese whaling industry? The answer may lie somewhere in between. Even if convinced of the legal justification of its actions, at a minimum, Japan should respond to these objections with an understanding that the legal and political landscape now favors conservation over utilization of cetacean resources.

THE STATUS OF SCIENTIFIC RESEARCH WHALING IN INTERNATIONAL LAW

*Nobuyuki Yagi**

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* Nobuyuki Yagi of the Embassy of Japan. These remarks were presented at the International Law Association ILA Weekend, October 2001, New York, New York, United States.

I. INTRODUCTION

It is an honor to speak before you at this panel. The issue of whaling has been extensively debated in various international occasions for at least one quarter of the century. No quick solution has yet to be found. This is partly because arguments against or for whaling tend to be based on political feelings, although these political feelings vary from country to country. In this situation, the legal and scientific facts are deserved to be the basis of the debate in order to achieve a proper settlement of the issue.

Today, I will provide the view of the Government of Japan on Japan's research program that includes the limited, lethal taking of whales. I will first summarize the reasons why the research program complies with Japan's obligations under international agreements, and then explain in greater detail the scientific nature and purpose of the research program. Finally, I will discuss how Japan's programs and policies are consistent with those of other countries, and with the conservation of all species of whales.

II. THE LEGAL CONTEXT OF JAPAN'S RESEARCH PROGRAM

The Japanese research program does not violate the letter or spirit of the International Convention for the Regulation of Whaling ("ICRW"),¹ nor does it violate the letter or spirit of the United Nations Convention on the Law of the Sea ("UNCLOS").²

A. ICRW

The ICRW stipulates in Article VIII that "[n]otwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research."³

The conduct of the Japanese government is in complete conformity with this provision. The text of the ICRW does not endorse a total protection of whales that would preclude the taking of any whales. Rather, a key objective of the ICRW is "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."⁴ It is clear that the ICRW represents an agreement to

1. International Convention for the Regulation of Whaling, Dec. 2, 1946, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter ICRW].

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter Law of Sea].

3. ICRW, *supra* note 1, art. VIII, ¶ 1.

4. *Id.* at pmb1.

manage whale stocks to permit the wise commercial use of the stocks and to avoid irresponsible exploitation.

Because the Japanese research program collects data necessary for whale conservation and the proper use of whale resources, the research program helps achieve the objectives of the ICRW.

B. UNCLOS

Article 65 of UNCLOS provides that “[s]tates shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.”⁵

With respect to the conservation of whales, Japan is working in good faith through international bodies, including the International Whaling Commission (“IWC”). We provide research data and other information to other countries and international organizations, and therefore it can reasonably be stated that our research practices do not conflict with this provision of UNCLOS.

C. IWC Resolutions

The IWC every year passes resolutions that recommend that Japan refrain from conducting its whale research program. However, such recommendations are non-binding. The resolution is proposed as a non-binding instrument, and adopted by a simple majority vote. At the 2001 IWC meeting, members of the IWC adopted two such resolutions, one by a vote of twenty-one for, fourteen against, and one abstention, and the other by a vote of twenty for, fourteen against, and two abstentions.

To adopt binding “regulations with respect to the conservation and utilization of whale resources” pursuant to Article V, the ICRW requires a three-fourths majority of those members voting.⁶ Also, the Rules of Procedure of the IWC require that any proposal involving an amendment to any Schedule adopted pursuant to Article V be “dispatched by airmail to the Commissioners at least sixty days in advance of the meeting.”⁷ The resolutions the IWC adopts on Japan’s research program are usually introduced at the time of the meeting, without sixty days’ prior notice of the text to members, thereby further indicating that the members do not consider the resolutions to be formally binding on Japan.

5. Law of Sea, *supra* note 2, art. 65.

6. ICRW, *supra* note 1, art. III, ¶ 2.

7. ICRW, *supra* note 1, Rules of Procedure, R. J., Order of Business.

These resolutions, because they are not binding under the terms of the ICRW, are asking a member state voluntarily to give up its treaty rights to conduct research. Failure to comply with such a request does not constitute a violation of the ICRW.

D. Conformity with Other IWC Regulations

Some may question Japan's catching of Minke whales in the Southern Ocean Sanctuary. Again, this activity does not violate the ICRW. The sanctuary provision prohibits only commercial whaling.⁸ Therefore, it does not apply to Japan's research program. Furthermore, Japan does not think this sanctuary is necessary to achieve the goal of the ICRW. Japan therefore lodged an objection to the Southern Ocean Sanctuary pursuant to Article V.3.⁹ As a result, under the terms of the ICRW Japan is not bound by the IWC's action on this sanctuary.

E. Proper Role of Science in IWC Deliberations

We believe that IWC members have made decisions in recent meetings that are inconsistent with the requirements in the ICRW that all such actions be based on science. These decisions include the approval of the sanctuary I have just discussed, which the members adopted without benefit of a supporting recommendation from the Scientific Committee. They also include the IWC's decision not to adopt a Revised Management Procedure ("RMP") as part of a Revised Management Scheme ("RMS") to regulate any commercial whaling that IWC members may approve, despite the approval by the Scientific Committee of a proposed RMP.

In 1993, the then-Chairman of the Scientific Committee, Philip Hammond, resigned from his position over the failure of the majority of IWC members to base their action on a proposed RMP on science. In his letter of resignation, Hammond noted that in 1992 the Science Committee unanimously recommended the adoption of an RMP to guide any possible resumption of commercial whaling that the IWC may approve. The members of the IWC declined to follow the recommendations of the Scientific Committee for reasons that Hammond wrote had "nothing to do

8. ICRW, *supra* note 1, Schedule, ¶ 7(b).

9. ICRW, *supra* note 1, sched., fn. relevant to ¶ 7(b) ("The Government of Japan lodged an objection within the prescribed period to paragraph 7(b) to the extent that it applies to the Antarctic Minke whale stocks . . . For all Contracting Governments except Japan paragraph 7(b) came into force on 6 December 1994"). Schedule, fn. relevant to ¶ 7(b).

with science.”¹⁰ He told the IWC’s Secretary that “I can no longer justify to myself being the organizer of and spokesman for a Committee whose work is held in such disregard by the body to which it is responsible.”¹¹

The 1994 decision to adopt the Southern Ocean Sanctuary was based on political opinion rather than scientific fact. The Scientific Committee of the IWC did not issue a recommendation supporting adoption of the Southern Ocean Sanctuary in 1994, and in fact had not even seen the amended sanctuary proposals the IWC adopted that year.¹² The chairman of the Scientific Committee, to the contrary, suggested “there was little to gain” from the proposal.¹³ Prior to the IWC Annual Meeting in 1994, Japan proposed a scientifically appropriate compromise version that would have excluded abundant Minke whales from the prohibition against the taking of whales in the sanctuary. At the same time it warned that “the IWC would enter into an identity crisis if such a [Southern Ocean] sanctuary with no scientific backing were to be adopted at the upcoming 46th Annual Meeting of the IWC. Abandoning science would constitute a dangerous precedent for all resource management in the future.”¹⁴ However, a majority of the members of the IWC voted against this compromise, and approved a sanctuary proposal covering all IWC species, regardless of the status of the stock of each species. In a subsequent letter to the IWC, the Commissioner of Norway to the IWC reiterated Norway’s opposition to the Southern Ocean Sanctuary and indicated that the establishment of this sanctuary was not in accordance with the ICRW because “there is no scientific basis for the Southern Ocean Whale Sanctuary.”¹⁵

The actions of the IWC members on adopting the Southern Ocean Sanctuary and disapproving RMP ignore Article V.2 of the ICRW, which states that any amendments to the Schedule governing the taking of whales “shall be based on scientific findings,”¹⁶ among other requirements.

10. Letter from Philip Hammond, Chairman, IWC Scientific Committee, to Dr. R. Gambell, IWC Secretary 2 (May 26, 1993), at www.highnorth.no/Library/mgnagreement-resignation/IWC/le-fromn.html.

11. *Id.*

12. 45 REP. INT’L WHALING COMM’N 45, 27-28 (1995).

13. *Id.* at 27.

14. Letter from Kazuo Shima, IWC Commissioner for Japan, to IWC Commissioners (Apr. 28, 1994).

15. Letter from Karsten Klepsvik, IWC Commissioner for Norway, to Dr. R. Gambell, IWC Secretary 1 (Sept. 5, 1994).

16. ICRW, *supra* note 1, art. V, ¶ 2(b).

III. SCIENTIFIC NATURE OF JAPAN'S RESEARCH PROGRAM

People sometimes complain that Japan's program violates the ICRW because it constitutes commercial whaling rather than scientific research. From our viewpoint, this is a serious misunderstanding of the nature of Japan's activities. As I will now discuss, Japan's scientific research program falls clearly within the provisions of the ICRW giving a member state the unconditional right to engage in scientific research activities.

A. *View of Scientific Committee of the IWC*

Japan's research plan and its results are annually reviewed and commented on by the IWC's Scientific Committee. The Committee consists of over one hundred scientists from around the world. Each year the members of this Committee give Japan's research program a positive evaluation.

For example, the 1997 Report of the Scientific Committee reported favorably on Japan's Antarctic research program, known as JARPA. The report noted that "[t]here was general agreement that the data presented on stock structure . . . were important contributions to the objectives of JARPA and stock management."¹⁷ The report added "the information produced by JARPA has set the stage for answering many questions about long term population changes regarding Minke whales . . . [and] has already made a major contribution to understanding of certain biological parameters."¹⁸

Japan also conducts another research program in the North Pacific that involves an annual sampling of 100 Minke whales, fifty Bryde's whales, and ten Sperm whales. This program, known as JARPN, has similar scientific objectives. The 2000 Report of the Scientific Committee noted that "information obtained during JARPN had been and will continue to be used in the refinement of *Implementation Simulation Trials* for North Pacific Minke whales, and consequently was relevant to their management."¹⁹

Some people claim that the Scientific Committee has suggested that Japan's research is not needed for whale management. This is another serious misunderstanding. It appears that the claim is based on citing out of context a portion of one sentence from the same 1997 report noted above that refers to the "major contribution" that JARPA was making. The sentence states: "The results of the JARPA program, while not

17. IWC, REP. OF THE SCI. COMMITTEE, IWC Doc. IWC/49/4, at 61 (1997).

18. *Id.* at 65.

19. IWC, REP. OF THE SCI. COMMITTEE, IWC Doc. IWC/52/4, at 74 (2000).

required for management under the RMP, have the potential to improve the management of Minke whales in the Southern Hemisphere.”²⁰

I was at the IWC meeting that particular year. Members of the Scientific Committee shared an implicit assumption that the RMP’s algorithms and computer program for calculating catch limits required only a few data inputs at the beginning stage of operations. At the same time, members of the Scientific Committee knew that if the input of additional data occurred, the accuracy of the RMP would increase. This is the context of the original wording in the Scientific Committee’s report. It does not oppose the collection of additional data by Japan, and it in fact recognizes the positive role such additional data plays in improving the management of Minke whales.

The IWC’s Scientific Committee has not endorsed Japan’s research catch. However, this is because the Scientific Committee is not authorized to do so. Paragraph thirty of the applicable ICRW schedule only directs the Scientific Committee to review and comment when possible on the research of member states.²¹ It is not the function of the Scientific Committee or the IWC to endorse or approve the research program generally, or its level of catch in particular. Only the government of the member state conducting the research has that right, under Article VIII of the ICRW.²²

B. Importance of Japan’s Research in Assessing the Moratorium

Japan undertook its research activity because the IWC needs scientific data to review the effects of its moratorium on commercial whaling. The moratorium by its own term does not preclude the resumption of commercial whaling. Paragraph 10(e) of the Schedule of the Convention adopted at the IWC Annual Meeting in 1982 specifies that “[t]his provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.”²³

The research program will also contribute to the required review of the whale stocks in the Southern Ocean Sanctuary. According to Paragraph 7(b) of the Schedule of the Convention, “this prohibition [the Southern Ocean Sanctuary] shall be reviewed ten years after its initial

20. IWC, REP. OF THE SCI. COMMITTEE, IWC Doc. IWC/49/4, at 66 (1997).

21. ICRW, *supra* note 1, sched., ¶ 30.

22. ICRW, *supra* note 1, art. VIII, ¶ 1.

23. ICRW, *supra* note 1, sched., ¶ 10(e).

adoption.”²⁴ The Government of Japan expects that Japan’s research will provide valuable research data to assist in this review.

Before the IWC first adopted a moratorium on commercial whaling, most scientific data had been obtained from samples gathered in connection with such whaling. Scientists complained that the samples had serious data biases, because commercial whaling targeted only large individual whales in small areas where there is a high density of whales. This caused an argument over the “uncertainty of the scientific data,” and contributed to the decision to adopt the moratorium.

Japan’s research program is designed to obtain unbiased data, and to obtain a fair representative of samples from the whales in vast ocean areas. As part of this effort, the program requires the research vessels to follow a special course that was designed to ensure a valid random sample, even though this increases the cost of the research effort.

The sampling size is 440 Antarctic Minke whales per year, which is significantly smaller than the number of Minke whales caught commercially each year in the early 1980s. The larger the sample size, the higher the statistical reliability of the data. Japan decided to limit the catch to 440, however, since it is the lowest number of takings possible that would still yield statistically meaningful research results. It is a very small portion of the total population of Southern Hemisphere Minke whales. Scientists believe that the population of Antarctic Minke whales has rapidly increased in the last half century from its original population of 85,000. It has done so by filling the ecological vacuum created when excessive whaling several decades ago eliminated many larger whales such as blue whales. In 1990 the Scientific Committee estimated the population of Minke whales to be approximately 760,000. In 1992 the Scientific Committee estimated that commercial whaling conducted under IWC-approved procedures could take annually at least 2000 Minke whales with no risk of depletion of the whales in the Antarctic. Even if the current population should turn out to be in fact somewhat lower, an annual catch of 440 is unlikely to pose any danger to the stock.

The key data the research program obtains is the age of individual whales, which can only be obtained from the whale’s internal earplugs. No other source can provide reasonably reliable data on the age of the whale. By using this age data, the research program can estimate whether the population trend is up or down.

The final results of Japan’s research program are expected to reduce the risk of mismanagement of the Minke and other whale resources. In other words, Japan’s research program is a good faith contribution to the

24. ICRW, *supra* note 1, sched., ¶ 7(b).

scientific review of the effect of the moratorium on whale stocks. The language establishing the moratorium in the first place mandates this scientific review.

C. Effective Research Cannot Be Conducted Through Non-Lethal Methods

The IWC has never concluded that non-lethal methods can adequately replace research that includes the lethal taking of whales, although there have been intensive discussions of this issue at the IWC. In the case of large terrestrial animals, scientists can closely study their age through individual identification of animals. This is relatively easy for terrestrial mammals in particular.

However, individual identification is almost impossible for Minke, Bryde's, and Sperm whales. As a result, scientists do not know of a non-lethal way to obtain age data for these whale species. The 1997 Report of the Scientific Committee agreed with this assessment, noting that the "logistics and abundance of Minke [whales] . . . probably precluded [the] application [of non-lethal methods]." ²⁵

I would also like to underline the fact that Japanese scientists conduct non-lethal research whenever possible. Many of our research projects only use sighting observations and acoustic surveys. Japan also studies stranded animals. The taking of whales is only permitted when it is absolutely necessary.

D. Sale of By-Products of the Research Activity

Paragraph 2 of Article VIII of the ICRW requires that by-products from research be fully utilized so far as is practicable. The provision states: "Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted." ²⁶ Accordingly, the whale meat resulting from the research program is sold in the market by the Institute for Cetacean Research, the non-profit institute responsible for carrying out the research. These sales help defer a portion of the cost of the research program. The rest of the cost has to be covered by a government subsidy. Thus, the research program does not result in any net profit or similar commercial advantage to those responsible for the project.

25. IWC, REP. OF THE SCI. COMMITTEE, IWC Doc. IWC/49/4, at 63 (1997).

26. ICRW, *supra* note 1, art. VIII, ¶ 2.

IV. OVERALL REASONABLENESS OF JAPAN'S POLICIES

Japan's policies are consistent with those of some other countries and with good conservation policies.

A. Majority of Countries Have Not Opposed Japan's Research

Some people argue that the vast majority of the world opposes the catching of whales for research. The majority of the countries of the world, however, have not taken a clear position on this issue.

There are around 190 countries in the world now. Only forty-three nations are members of the IWC. Only twenty-one of the forty-three nations have opposed Japan's research program. At least fourteen nations are sympathetic to this research, judging from the vote at the most recent IWC meeting.

With only twenty-one of the world's 190 countries clearly on record against Japan's research program, it is not accurate to say that the "world" is against this research.

B. Other Countries Also Catch Whales

When it comes to the taking of whales, various nations including Canada, Denmark, Indonesia, the Philippines, Norway, Russia, the United States, and a Caribbean nation catch large whale species such as Bowhead, Bryde's, Fin, Grey, Humpback, Minke, or Sperm whales.

The Bowhead whaling by the United States represents the highest ratio of harvest to total population of any program. Its annual harvest amounts to 0.9% of the Bowhead whale population. Japan's annual level of take in its research program is less than half this percentage.

A number of other countries in addition to Japan have also engaged in the taking of whales for scientific purposes, pursuant to Article VIII of the ICRW. Prior to 1982, over one hundred permits were issued by governments like the United States and Canada for this purpose. After adoption of the moratorium, Norway and Iceland also issued permits for research programs. Thus, Japan's research program is not unique.

C. Healthy Status of Certain Whale Stocks

Since the 1970s, whales have been protected, and most whale populations are abundant. There still are five depleted species among the large whales, and Japan strongly supports the international protection of these endangered whale species. Japan every year donates more funds than any other IWC member to support the IWC's research activities concerning these endangered species.

With respect to certain abundant species, however, it is no longer necessary to prohibit the taking of whales in order to protect them from becoming endangered. It is reasonable to allow the carefully regulated reopening of commercial whaling for these species to help achieve a key objective of the ICRW. Some people have expressed concern that once whaling is resumed; it will expand rapidly and become uncontrollable. This is highly unlikely.

The IWC Scientific Committee has adopted a new program for calculating appropriate catch limits based on the work of a well-known scientific expert, Dr. Justin Cooke. Japan and Norway have already agreed to these limits, although they are based on methodology so conservative that if it were applied to fish, it would preclude the harvesting of fish in most major fisheries on the high seas. In reality, the world's whaling industry shrank in the 1970s when cheap substitutes for whale oil were introduced. Even without strict IWC catch limits, overhunting would be unlikely to occur with the resumption of commercial whaling because demand for whale products today is much lower than in the past.

V. CONCLUSION

A program of limited taking of whales for the purpose of science would be consistent with the proper conservation of whaling stocks, as provided in the ICRW.

As a country that has an interest in responsible utilization of marine resources, Japan is conducting its current research program to assess the stock of certain whales within the limits of the current legal and scientific constraints. Japan only authorizes catches of the lowest number of non-endangered whale species necessary to carry out the scientific research anticipated by the existing schedules to the ICRW. No scientifically adequate alternatives to the research exist.

Some countries oppose the continuation of scientific research, while at the same time they argue Japan has not provided the necessary evidence that commercial whaling can be safely resumed. In no other fishery organizations do these countries argue against both commercial fishing and the conduct of scientific research necessary to determine the sustainability of the fishery. If they did make these arguments, almost all utilization of such fishery resources would be barred.

The differences of opinion between IWC members have proven exceptionally difficult to resolve. However, Japan will continue to engage in dialogue with any other member in a good faith effort to resolve these differences.

Thank you. I look forward to hearing the comments of others, and to take questions from the audience.

TRADE POLICY UNDER THE BUSH ADMINISTRATION

Richard N. Gardner

Let me begin by saying that I believe the Bush Administration is doing an excellent job in trade policy. Peter Davidson has given some convincing reasons why we need Trade Promotion Authority and a successful start of a new World Trade Organization (WTO) Trade Round at Doha. I would add two other reasons.

First, we need further trade liberalization in two key areas of trade where foreign trade barriers prevent us from fully capitalizing on our competitive advantage: agriculture and services. The agricultural export subsidies of the European Union are over seventy times greater than those of the United States. The European Union provides more than six times as much trade-distorting domestic support as we do. The average maximum agricultural tariff of WTO members is over sixty percent, compared to twelve percent in the United States. In services, we continue to face obstacles in important foreign markets for our banks, insurance companies, securities firms, and other service providers. We must remedy this by supplementing the GATTs framework agreement of the Uruguay Round with meaningful market access commitments.

Second, we need to do much more to open markets for the products of the developing countries. This is an additional reason for seeking reforms in the European Union's Common Agricultural Policy. The United States should be willing to reduce its own agricultural trade barriers—in sugar, for example—that damage developing country economic prospects. The industrialized countries should also be willing to make substantial reductions in their restrictions in labor-intensive industries such as textiles and footwear. The WTO now consists of 142 members, of whom three-quarters are developing countries. The best way to assure the success of the next trade round is to make it a "Development Round" so that the benefits of trade liberalization are fully and fairly shared.

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Peter Davidson has explained why Trade Promotion Authority (TPA) is needed if our trade negotiators are to have credibility with other countries. The Thomas bill, H.R. 3005, provides TPA in a pragmatic, sensible way. It recognizes the need to include worker rights and the environment in the trade agenda, but it avoids insisting that all the International Labor Organization's core worker rights be accepted immediately as a condition for receiving trade benefits.

As a final observation, I would urge that the Bush Administration develop a policy on international assistance as realistic and far-sighted as its trade policy. Except for a little extra money for international programs on AIDS, the Administration's budget requests for the current fiscal year provide for no increase after inflation in spending for sustainable development (health, education, food security), on aid to refugees and humanitarian assistance, on economic support on behalf of peace efforts in the Balkans and Middle East, or on democracy building and safeguarding nuclear materials in the republics of the former Soviet Union.

The budget does not even provide funds to pay our \$490 million in arrears to the multilateral development banks. Worse still, the Congressional budget resolution provides for no growth after inflation in the foreign affairs budget from 2002 to 2011. This spending target is at odds with the ambitious international development goals the United States is committed to achieve by 2015 with its partners in the Group of Eight and in United Nations bodies.

Our defense budget has been increased to \$343 billion for this fiscal year, but our foreign affairs budget is still only \$23 billion, of which only about \$10 billion is for international aid. This is 0.1% of our gross national product (GNP), compared to the average aid contribution of 0.35% of GNP by other developed countries. An improvement in the quantity and quality of our aid efforts would help build developing country support for our trade objectives as well as other priorities of our foreign policy.

The tragic events of September 11th and the struggle against terrorism on which we are now embarked make it even more urgent to re-examine our development aid policies. It is already clear that we will need to join with other developed countries in providing substantial financing for the reconstruction of Afghanistan. But we will also need to take a broader approach, addressing with other nations the desperate poverty and hopelessness that have been such a fertile breeding ground for terrorism.

THE INTERNATIONAL COMMERCIAL ARBITRATION MODEL AND PUBLIC INTERNATIONAL LAW DISPUTES

Richard W. Hulbert

As someone who has been close to the ICC for more than fifteen years, my position on this afternoon's topic must seem preordained, except to those cynical enough to believe that familiarity breeds contempt rather than more familiarity. Although, or perhaps because, I am a strong proponent of international commercial arbitration as it now is, I have some concerns about the adequacy and appropriateness of it as a model for the resolution of the kinds of public law questions that have come up and surely will arise with ever increasing frequency under the now thousands of treaties providing for arbitration of investment disputes.

I do not question what Judge Holtzmann has said about the Iran-United States Claims Tribunal and its use of the same UNCITRAL Rules¹ that are frequently an option under the investment treaties. The Tribunal has been a grand success and in no small part because of the quality of the judges who have served it. Arbitration before the Tribunal, however, is quite a different animal from ordinary international commercial arbitration or from the structure provided for treaty arbitration of investments. We notice that the Tribunal has "judges", indeed, it has a stable cadre of these judges, it sits in one place, the Hague, it publishes its decisions, as any proper court should do, and no doubt over the years it has developed a set

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1. The Arbitration Rules of the United Nations Commission for International Trade Law (adopted by UNCITRAL on April 28, 1976, and approved by United Nations General Assembly Resolution 31/95 on December 15, 1976) [hereinafter the UNCITRAL Rules.] The UNCITRAL Rules are reprinted in II YEARBOOK COMMERCIAL ARBITRATION 147 (1977).

of procedures, modes of proof and terms of substantive jurisprudence well known to the bar that practices before it.²

This recital will bring to mind the many points of difference between the Iran-United States Tribunal and what I will call ordinary international arbitration. I will briefly touch on three of them: confidentiality, fluidity of process, and the uncertain or varying degree of judicial review.

First as to confidentiality. In ICC practice this is carried to the point that the ICC will not even confirm that X and Y are parties to an arbitration pending before it. Confidentiality is required under the ICSID Additional Facility Rules³, frequently availed of in investment treaty arbitrations, as it is under the UNCITRAL Rules.⁴ Confidentiality appears to be one of the most significant attractions of international commercial arbitration for the parties that resort to it.⁵ In the usual case the hearings are closed⁶ and the award remains undisclosed, unless there are subsequent judicial proceedings. Consideration surely must be given to whether it is

2. See, e.g., Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L LAW. 47, 49-54 (1994) (reporting on the principles "routinely applie[d]" by the Hague Tribunal in evaluating evidence).

3. Article 14(2) requires each arbitrator to sign a declaration that includes the statement that "I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding as well as the contents of any award made by the Tribunal." If he fails to do so by the conclusion of the first session of the tribunal, he "shall be deemed to have resigned." *Id.* Under article 24(1) "The deliberations of the Tribunal shall take place in private and remain secret." Article 39(2) states that "The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings." Under article 44(2) the minutes of hearings "shall not be published without the consent of the parties."

4. Article 25(4) provides that "Hearings shall be held *in camera* unless the parties otherwise agree." Article 35(2) provides that "The award may be made public only with the consent of the parties."

5. According to the results of a recent survey of practitioners and users of international commercial arbitration, the confidentiality of arbitral proceedings ranked behind only the neutrality of the forum and the assurance of worldwide enforcement of the award as an attraction of arbitration. CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 395-96 (1996).

6. This is explicitly provided for in the major international arbitration rules. Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce (the ICC Rules)(1998), art. 21(3) ("Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted [to the hearings]"); Arbitration Rules of the London Court of International Arbitration (LCIA Rules) (1998), art. 19.4 ("All meetings and hearings shall be private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise"); International Arbitration Rules of the American Arbitration Association (AAA International Arbitration Rules) (1997), art. 20(4) ("Hearings are private unless the parties agree otherwise or the law provides to the contrary"); UNCITRAL Rules, article 25(4), *supra* note 4.

an appropriate element of litigations (before arbitrators, to be sure) that challenge important national regulation.

A second attraction of ordinary international commercial arbitration is the very fluidity of the available procedures. All the major international arbitration rules, again including the UNCITRAL Rules, leave the shaping of a particular case to the expectations, desires and traditions of the parties and the arbitrators.⁷ It is, in fact, the very intention of these rules to accommodate different legal traditions and legal cultures. Whether there is any discovery at all, how witnesses are questioned, whether partisan expert testimony may be presented—these and many other such questions are left for case by case arrangement. Some might well conclude that such uncertainty is an obstacle to adjudication of public law questions.

These two issues may be thought to take on particular importance in the context of treaty arbitration of public law regulations when one considers that, although the details of the individual cases will vary, these arbitrations are primarily focused on giving content to or interpretation and implementation of the treaty constraints on government action that affects investment. How does a consistent jurisprudence develop if a decision must be reached in substantial ignorance of others on the same issue? In private commercial arbitration, by contrast, the issues in controversy are all over the lot and usually of narrow compass or effect, and the applicable law is whatever the parties have chosen.⁸

A third circumstance that almost surely matters less in respect of private international arbitration than in public law arbitration is the varying degree of post-award judicial scrutiny. Under ICSID procedures (applicable in many investment treaty arbitrations), there is no national court review of any kind: the national court's obligation under Article 54 of the Washington Convention is simply to enforce.⁹ On the other hand, an

7. ICC Rules, art. 15(1); LCIA Rules, art. 14.1; AAA International Arbitration Rules, art. 16(1); UNCITRAL Rules, art. 15(1). These provisions reflect the principle enunciated in Article 19(1) of the UNCITRAL Model Law on International Commercial Arbitration (1985): "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings." This provision has been described by the UNCITRAL Secretariat as "the Magna Carta of Arbitral Procedure." See HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 364-68 (1989).

8. This generalization is subject to the possible application of what is usually termed the "mandatory law" of a jurisdiction other than the jurisdiction whose law has been stipulated as applicable by the agreement of the parties. See, e.g., Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in *COMPARATIVE PRACTICE AND PUBLIC POLICY IN ARBITRATION* 242-254 (Pieter Sanders ed. 1986).

9. Paragraph 1 of article 54 provides in part as follows: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary

award rendered under the ICSID Additional Facility procedures, which are not subject to the Washington Convention, or under the UNCITRAL Rules, is subject to whatever judicial review is available under local law at the place of arbitration and under Article V of the New York Convention almost everywhere.¹⁰ If coherent investment treaty interpretation is desirable, or even judged indispensable, is this diversity in the review process constructive?

If there are issues as to process, there are also implications that arise from the possible results of these treaty arbitrations. In the usual case the investor challenges host country regulation. What is the standard by which such a challenge is to be weighed? Is it something akin to the traditional American view of what constitutes a taking? Under the Fifth Amendment it has recently been held by the Supreme Court that "mere diminution in the value of something, however serious, is insufficient to demonstrate a taking."¹¹ Or is it the proposition announced by the Iran-United States Claims Tribunal in the SEDCO case some years ago, that "a state is not liable for economic injury which is a consequence of bona fide regulation within the accepted 'police power' of states?"¹² Or is it something else, or several somethings else, applied variously by successive arbitral panels operating confidentially and substantially or totally immune from judicial review? Is this a recipe for success?

If arbitral procedures are applied where they do not necessarily fit well, injurious consequences may follow for the arbitral process where it does serve well. In some countries, though not the United States, predispute arbitration clauses in consumer or employment contracts are not enforceable.¹³ Where, as in this country, they are enforceable¹⁴—at least so

obligations imposed by that award within its territories as if it were the final judgment of a court in that State."

10. Article V of the New York Convention establishes the minimum standards for recognition of a foreign award in every state that is a party to it. By contrast, it is generally accepted that an award may be set aside only in the state where (or under the law of which) the award was rendered, and that in setting aside an award the state where it was rendered is not constrained by the New York Convention in the scope of its review. *See International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera*, 745 F. Supp. 172 (S.D.N.Y. 1990) (New York District Court had no authority to set aside an arbitral award rendered in Mexico); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997) (an award in international arbitration rendered in the United States may be set aside for "manifest disregard of the law" although that is not a permitted ground under the New York Convention on which an international award rendered abroad may be refused recognition).

11. *Concrete Pipe & Prod. Co. of California v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

12. *SEDCO Inc. v. National Iranian Oil Co.*, 9 Iran-US C.T.R. 248, 275 (1985).

13. For example, under Article 2061 of the French Civil Code, predispute arbitration clauses, as distinct from the submission to arbitration of existing disputes, is generally authorized

far—there is ample evidence of intense pressure on the court system to intrude into the arbitration process in the interest of perceived “fairness”¹⁵: is the expense prohibitive, is the panel fairly composed, is there adequate access to necessary evidence, did the arbitrator, to cite a recent decision in the Second Circuit, “manifestly disregard the law or the evidence or both?”¹⁶ A concern one might reasonably have is that prophylactic doctrines justifying increased court intervention into arbitration, contrived to deal with such perceived problems, will be unthinkingly extended to international arbitrations between sophisticated business enterprises, where they are not needed and where they would run counter to the most significant attraction of international commercial arbitration, its freedom from interference by national courts.¹⁷

I am concerned that judicial action along similar lines may follow if arbitral decisions of public law questions are seriously unacceptable in the politics of the host country, with a negative spill-over effect on current practice in private international commercial arbitration. Courts will not necessarily restrain themselves, as the Indonesian courts did not in the recent CalEnergy geothermal project cases.¹⁸ Constraints on judicial review can be evaded or ignored. Indeed, treaties can be denounced or simply not adhered to. Dubious doctrines may well be born of difficult cases.

In light of the foregoing, it would be well to consider improvements that could be introduced into arbitration of public law questions which would represent departures from the international commercial arbitration model, such as substantive standards applied with reasonable uniformity, transparent procedures, available jurisprudence, and perhaps, following the example of the Iran-United States Claims Tribunal, the establishment of panels of arbitrators. In that way the undoubted value of honest and

only for contracts concluded “by reason of professional activity,” as distinct from submission of existing disputes to arbitration, permitted by article 2059. Article 631 of the Commercial Code confines the permitted scope of pre-dispute arbitration clauses to matters over which the commercial courts have jurisdiction.

14. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

15. See, e.g., *Cole v. Burns Int’l Sec. Services*, 105 F.3d 1465 (D.C. Cir. 1997).

16. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999).

17. The Bühring-Uhle study, *supra* note 5, lists neutrality—primarily freedom from the intrusion of the national courts of either contracting party—as the “most highly relevant” attraction of international commercial arbitration.

18. See Mark Kantor, *International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?*, 24 FORDHAM INT’L L. J. 1122 (2001).

neutral decisions that international arbitration can provide may be brought effectively to bear on these important questions.

COVERAGE AND MEDICAL NECESSITY DETERMINATIONS: U.S. MANAGED CARE TREATMENT DECISIONS VERSUS GERMAN ADMINISTRATIVE RULEMAKING

*Ursula Weide**

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I. INTRODUCTION

Efforts at health care cost containment are common to all industrialized nations. In most countries, governments set the framework for such measures, and exert a certain degree of control over both the delivery and the standard of health care. Macro-level decisions define coverage and allocate health care funds, micro-level allocation is mostly left to the clinical judgment of the attending providers. Since at least some restraints on the provision of care to individual patients are exercised in all our nations, either through specific state rationing decisions (such as limiting the access to dialysis in Great Britain) or through budgets for health care (as in Germany), clinical and financial considerations have become inextricably intertwined. Physicians are increasingly moving from “advocacy to allocation.”¹ The United States Supreme Court, in its recent ruling in *Pegram v. Herdrich*,² created the term “mixed eligibility and treatment decisions,” and declared rationing to be an integral element of the managed care approach to health care cost containment. A high-level official of the German Ministry of Health chided physicians for chafing against cost-based considerations imposed on them through budgets by claiming that rationing has always been a component of clinical decision making as resources have never been unlimited.³

1. John K. Iglehart, *Health Policy Report: The American Health Care System*, 327(10) NEW ENG. J. MED. 742 (1992) (quoting DAVID MECHANIC, FROM ADVOCACY TO ALLOCATION: THE EVOLVING AMERICAN HEALTH CARE SYSTEM (1986)).

2. *Pegram v. Herdrich*, 120 S.Ct. 2143 (2000).

3. Dr. Schulte-Sasse, *Was soll das “Geschrei der Ärzte”?* [Why are Physicians “Whining”?], 26 MED. TRIBUNE 18, June 30, 2000.

Macro-level allocation of health care funds is based on coverage and medical necessity definitions, micro-level allocation involves the; performance or denial of treatment and diagnostic procedures. Coverage is set by contract (managed care) or by statute (Germany), specifying either specific benefits (managed care) or general categories of services (Germany) members⁴ are entitled to receive. Macro-level medical necessity definitions in managed care plan documents can be quite generous and reflective of the prevailing standard of care, but on the micro-level are operationalized through the application of restrictive criteria for access to care. Benefits may be included in the macro-level coverage contract and certainly covered by the promise to "provide all medically necessary care according to good medical practice" but may still be denied at the bedside for lack of "medical necessity." The SGB V (Title Five of the Social Code), the foundation of the German statutory health care system, defines both coverage and medical necessity as concepts but does not use those terms. Only lately, influenced by information on managed care techniques in the United States, has "medical necessity" found its way into the most recent German code revisions. But in spite of apparent similarities, the cost containment approaches pursued in these two countries is diametrically opposed. In Germany, the law provides a general framework for the guaranteed delivery of health care and relies on the therapeutic autonomy of the clinical decision maker. In the United States, managed care organizations (MCOs) have implemented an elaborate utilization management bureaucracy to control care at the bedside.

II. UNITED STATES: MANAGED CARE TREATMENT DECISIONS

A. *The Managed Care Approach to Health Care Delivery*

Almost fifty percent of all health care expenditures in the United States are financed by the government through programs such as Medicaid and Medicare, while sixty percent of the population are covered by private insurers, accounting for only thirty percent of total spending.⁵ Seventy five percent of working Americans obtain private health insurance through employer-sponsored plans which rely on contracts with large managed care

4. The common German term is "patient," not "subscriber" or "member," since 90% of all Germans are covered under the statutory health care system, the remainder by private insurance. All therefore are patients as of the first day of their lives.

5. Sheila Smith et al., *The Next Decade of Health Spending: A New Outlook*, 18 HEALTH AFFAIRS, No. 4, July/August 1999 at 86.

corporations, providing health care on a prepaid basis for a total of over 170 million individuals.⁶

Managed care was initially conceived as a cost-effective alternative to the traditional fee-for-service indemnity plans. It consisted of vertically integrated, brick-and-mortar health care delivery systems (called HMOs) and employed salaried providers. Today, having metamorphosed into giant corporations, MCOs offer employers a multitude of contractual arrangements—"products"—for the provision or arrangement of medical care which may include an insurance and claims processing function.⁷

6. Currently, 16% of Medicare beneficiaries—6.2 million among 39 million individuals covered by the program—also receive their medical care through MCOs because the Health Care Financing Administration temporarily assumed that managed care would help to lower costs. But since Medicare, a system of social insurance similar to the German statutory health care system, has attempted to curb spending, MCOs are increasingly terminating services to Medicare beneficiaries. By January 2001, almost 1.7 million elderly patients will have their medical care disrupted. Even though government studies have shown that Medicare is already paying MCOs more for individual patients than it would pay for them in its fee-for-service program (all those dropped by a MCO will revert back to the traditional Medicare coverage), Republican members of Congress have agreed on adopting a Medicare spending package which "would pump large sums of money into HMOs." As a representative of a managed care trade association noted, "Medicare managed care is a program in crisis . . . it needs to be rescued"; while the president of the Greater New York Hospital Association observed, "Congress is channeling money from hospitals on Main Street to investor-owned HMOs on Wall Street, enhancing the profits of managed care companies without improving the delivery of services." Robert Pear, *Congress Near Deal to Raise Fee Payments to H.M.O.s*, N.Y. TIMES, Oct. 12, 2000, at 16. So far, Congress has been unable to pass a "Patients' Rights Bill," regulating managed care abuses on a national level.

7. Most employers today, however, are "self-insured," bearing all actuarial risks while minimizing them through reinsurance. "Self-insurance" creates a legal vacuum because §502(a), the civil enforcement section of ERISA (the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*) preempts state law causes of action for malpractice and denials of benefits against providers and MCOs, and limits actions to benefit recovery and the clarification of current and future rights under the plan. §514(a) preempts all state tort law claims against employee benefit plans "relating to" ERISA plans; §514(b) "saves" from preemption any state law regulating insurance, but §514(c) "deems" all self-insured employee benefit plans not to be insurers, thus exempting them from state insurance regulation. The Supreme Court, however, has reined in the preemptive reach of §514(a) by limiting the expansive interpretation of the term "relate to" in three cases: *New York State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 115 S.Ct. 1671 (1995); *DeBuono v. NYSA-ILA Med. And Clinic Services Fund*, 117 S.Ct. 1747 (1997); *California Division of Labor Standards Enforcement Division v. Dillingham Construction*, 117 S.Ct. 832 (1997).

In *Unum Life Ins. Co. of Am. v. Ward*, 119 S.Ct. 1380 (1999), the Supreme Court weakened the scope of §514(b) by ruling that California's "notice prejudice rule" regulates insurance and thus falls outside of this section. The Court specified that all three factors enumerated in the McCarran-Ferguson Act defining when a business is to be considered an insurance company are merely "checking points or guideposts."

Furthermore, after the Third Circuit ruling in *Dukes v. U.S. Healthcare*, 57 F.3d 350 (3d Cir. 1995), distinguishing between the "quality" and "quantity" of medical care, many malpractice cases which formerly would have been preempted by §502 as actions for

Common to all these plans is patient access to a limited network of providers such as physicians and hospitals which receive discounted, often capitated, fees in exchange for a higher volume of cases. Increasingly, plans include a POS option (point of service) which permits members to receive treatment by non-network providers but requires a higher copayment to be paid out-of-pocket.

MCOs rely on a number of cost-containment mechanisms: primary-care gate keeping to restrict referrals to more expensive specialists; telephone hotlines staffed by nurses to be called in emergencies to reduce emergency room utilization; financial incentives for providers⁸ and administrative staff; capitated payments shifting the morbidity risk to providers, and utilization management, a corporation-wide complex system designed to reduce the use of health care resources. Based on corporate averages and/or treatment guidelines both corporate and commercial, health care funds are micro-allocated through case-by-case preauthorization for medical procedures and hospital admissions. Treatment plans submitted by providers are reviewed prospectively, followed by the concurrent review of the course of treatment. Administrative case managers may deny procedures and shorten hospital stays, often contrary to the attending physicians' recommendations. Regional and national norms are computed and compared with the utilization data collected for individual providers. Such "provider profiling" allows the MCO to detect patterns of "overutilization" and the frequency with which a provider has appealed case managers' decisions. Providers falling outside of the norms are "deselected." Furthermore, accounting firms are called in to audit utilization management procedures, analyze treatment and hospitalization denial rates, and suggest areas for additional cost-savings. Increasingly, medical decisions and guidelines are thus determined by cost-based criteria, ignoring the clinical circumstances of individual patients, and lowering the quality of care across the board.

administrative benefit denial, were remanded to state court. In *Pegram*, *supra* note 2, the Supreme Court created the term "mixed eligibility and treatment decisions," defined as all benefit decisions involving medical judgment. Health care, however, has traditionally been reserved to state regulation. The door is now open for courts to limit ERISA preemption to the few purely administrative coverage decisions, making available the full range of state law remedies for patients or their survivors victimized by managed care abuse.

8. Financial incentives include year-end bonuses or withholds from compensation to limit the referral to specialists, and the utilization of diagnostic and therapeutic procedures, as compared with corporate benchmarks. Financial incentives for achieving such performance targets are often laid out in the provider contracts. In regions served by no more than one or two MCOs where most of the insureds are members, providers have no or very limited choice but to sign such contracts.

While utilization management serves the micro-allocation of health care funds on a case-by-case basis, macro-allocation occurs when employers contract with MCOs for the provision or management of medical services. These contracts determine eligible individuals such as employees, spouses and children up to a certain age, and cover benefits such as ambulatory care, hospitalization and prescription drugs. Frequently excluded from coverage under such "plans" are preexisting conditions, cosmetic and other "elective" surgery, mental health benefits, "experimental" treatments such as high dosage chemotherapy and autologous bone marrow transplants, alternative therapies, "convenience items" such as some types of durable medical equipment, childhood immunization, obesity treatment, in vitro fertilization, and surgery to correct nearsightedness. These could be termed "categorical exclusions" while "selective coverage" limits certain services under certain conditions. Rehabilitative therapy may be covered only "when the personal physician determines that significant improvement of a member's condition can be expected within a period of two months." Physical, occupational, and speech therapy may not be authorized "when there is no reasonable expectation that the member's condition will *improve* over a predictable period of time as determined by the plan."⁹ Plan subscribers often receive only summary plan descriptions promising "all medically necessary care."¹⁰

9. CLARK C. HAVIGHURST ET AL., *HEALTH CARE LAW AND POLICY* (1998). See also *Bedrick v. Travelers*, 93 F.3d 149, 153-155 (4th Cir. 1996). Travelers had argued that physical therapy for a small child with cerebral palsy was no longer a covered benefit "based upon a finding that the specified treatments did not reach a level of potential for significant progress which would allow the therapies to be provided on a medically necessary level." The boy's pediatrician had given the child a fifty/fifty chance of walking by age five. The court ruled, first, that the "significant progress" requirement was not laid down in the plan nor in any internal corporate guidelines, and second, that "the implication that walking by age five would not be 'significant progress' for this unfortunate child is simply revolting." Furthermore, the application of the *Firestone Tire and Rubber Co. v. Bruch Standard*, 489 U.S. 101 (1989) led to a finding of abuse of discretion by the MCO as the policy had promised as medically necessary and covered durable medical equipment "which replaces a lost body organ or part or helps an impaired one to work." (An upright stander is important for bone and hip joint development in a child with cerebral palsy, and facilitates sustained neck and trunk extension.) But the court upheld the lower court's denial of speech therapy since the policy specified that "these services must be given to restore speech." As the child had never been able to speak, "medically necessary or not, there is just no coverage here."

10. Micro-allocation issues have been litigated more frequently than coverage issues on a macro level. Managed care companies micro-manage treatment on a case-by-case basis. Macro coverage issues concern, for example, the ERISA preemption of state laws mandating standards of care and prohibiting discrimination, and the fiduciary duties of ERISA fiduciaries such as disclosure and avoidance of dual loyalties. See RAND E. ROSENBLATT, SYLVIA A. LAW, SARA ROSENBAUM, LAW AND THE AMERICAN HEALTH CARE SYSTEM 140-41 (1997) [hereinafter ROSENBLATT ET AL.].

B. Medical Necessity

Even though plan documents may promise all medically necessary care, medical necessity determinations by the managed care company, functioning either as the payor or the arranger of medical services, often result in the denial of procedures recommended by the attending physician.¹¹ This raises two questions: is there a valid definition of medical necessity, and how do managed care companies operationalize medical necessity?

So far, no federal agency has received the mandate and resources to propose a valid definition. For many years, however, state courts have struggled with the issue since managed care policies are private insurance contracts, and federal courts have ruled in employee benefit cases under ERISA. At least one state court found that "medical necessity" was ambiguous as a matter of law and hence, under the rules of construction for insurance contracts, a question of fact for the jury.¹² But no consensus has emerged among the courts. State legislatures, however, have responded to the need to prevent MCOs from denying needed care. Today, almost half of all states have adopted statutory definitions of "medical necessity," most of them for managed care plans, some for Medicaid.¹³ A typical example is the definition adopted by the state of Virginia:

"Medical necessity" or "medically necessary" means appropriate and necessary health care services that are rendered for any condition that, according to generally accepted principles of good medical practice, requires the diagnosis or direct care and treatment of an illness, injury, or pregnancy-related condition, and that are not provided only as a convenience.¹⁴

Some states define the standard of care more or less restrictively: "Treatment or care in accordance with *nationally* accepted current medical criteria" (Louisiana); "Within generally accepted standards of medical care

11. The German term for medical necessity is "*medizinische Notwendigkeit*." *Notwendigkeit* is a composite noun of *Not* (distress, misery, imminent danger) and the verb *wenden* (to change, to turn around). As a German physician commented, "The question is how to define distress, who should turn it around, and who should decide on both." Klaus Schnetzer, *personal communication*, on file with the author.

12. ROSENBLATT ET AL., *supra* note 10, at 211, 212. *Dallis v. Aetna Life Ins. Co.*, 574 F.Supp. 547, *aff'd* 768 F.2d 1303 (11th Cir. 1985).

13. PANEL PUBLISHERS, 2001 STATE GUIDE TO MANAGED CARE LAW §5.1 (2001) [hereinafter 2001 STATE GUIDE TO MANAGED CARE LAW].

14. 1998 Va. Acts ch. 891.

in the *community*" (North Carolina); "In accordance with the *prevailing* practices and standards of the *medical profession* and community" (Texas). Several states mandate that medical necessity must be determined by a physician (Louisiana, Texas, Wisconsin).¹⁵

C. *Managed Care and The Operationalization of Medical Necessity*

1. The Use of Corporate Criteria

Even though many plans contain a seemingly appropriate contractual definition of medical necessity (often in accordance with state law), the procedures by which coverage is operationalized through a panoply of (unregulated) corporate criteria determine the actual provision of medical care. Such restrictive criteria, sometimes spelled out in policies provided to members but often supplemented by additional internal undisclosed guidelines, often fly in the face of the prevailing standard of care, sometimes even in the face of logic. They have spawned a spate of novel lawsuits, most of them still pending, which incorporate, for example, causes of action for breach of contract and fiduciary duty based on internal undisclosed cost-based criteria and procedures. These result in coverage determinations according to factors other than medical necessity, and designed to reduce the level of medically necessary services.

The complaint in *Pennsylvania Psychiatric Society v. Green Spring, Magellan*,¹⁶ stated that the Provider Agreement concluded with psychiatrists required Green Spring to "provide medically necessary health services to patient-subscribers in a prompt and efficient manner consistent with the standard of practice of the community in which the Provider renders Health Services." According to the Agreement, "Green Spring's utilization management procedures shall not diminish Provider's obligation to render Health Services consistent with the applicable standard of care."¹⁷ Plan documents assured patient-subscribers that, whenever medically necessary, they would receive up to twenty outpatient treatment sessions per calendar year, thirty inpatient days per consecutive twelve-month period, seven days of detoxification, and thirty days of rehabilitation for substance abuse care. The complaint alleged, however, that Green Spring applied more restrictive internal guidelines, not disclosed to patient

15. LA. REV. STAT. ANN. §§ 22:657(D)(3)(e) (West. 2001), 40:2232(B)(5) (West. 2001); N.C. GEN. STAT. ANN. §§ 58-3-200(b), 58-3-200 (2001); TEX. ADMIN. CODE tit. 4, ch. 88, § 88:001 (no longer in effect); WIS. ADMIN. CODE § 3.54(3)(d) (2001).

16. Amended Complaint (Aug. 1999), in *Pennsylvania Psychiatric Soc'y v. Green Spring Health Services*, 2000 U.S. Dist. LEXIS 7953 (W.D. Pa. 2000) (Civil Action No. 99-937), *vacated and remanded*, 280 F.3d 378, 2002 U.S. App. LEXIS 1816 (3d Cir. 2002).

17. *Id.* at 10.

subscribers, to reduce benefits. These internal guidelines and standards, "developed to increase profits by denying care," allegedly violated Green Spring's obligations under the Provider Agreements, contradicted representations made to both employer-purchasers and patient-subscribers¹⁸, and routinely and systematically undermined the quality of behavioral health care and substance abuse treatment.¹⁹ Green Spring care managers, for example, were said to have refused to authorize treatment plans for another round of therapy sessions when the proposed treatment plan was identical to the one for the sessions which had already taken place. This rendered the provision of medically necessary and appropriate treatment impossible for those patients who had not responded "to therapy within the arbitrary time frame allotted to patient-subscribers by Green Spring."²⁰ The management of mental illness, including substance abuse, however, often requires longer-term treatment planning because of therapy-resistant syndromes, comorbidity and repeat episodes—no different from many somatic illnesses.

In spite of a number of poignant cases presented in the complaint as examples, the magistrate judge found for lack of association. He recommended dismissal of the action for breach of contract, good faith and fair dealing, interference with present and prospective economic advantage, tortious interference with the physician-patient relationship, and fraudulent misrepresentation. Even though acknowledging that "this case is pregnant with issues constituent to the ongoing public debate concerning managed health care," the magistrate judge stated that individual patients could instead sue in their own behalf, alleging specific injuries.²¹

The Green Spring medical necessity and utilization review criteria for residential treatment for substance abuse have recently been the subject of

18. *Id.* at 25.

19. From 1988 to 1998, the employer-provided value of health benefits generally declined by 11.5% while both in- and outpatient substance abuse benefits were reduced by 74.5%. 80% of the participants of an American Society of Addiction Medicine annual meeting felt that managed care had a negative impact on "the quality of care of my addicted patients." 81% indicated that managed care also had a negative impact on their "ethical practice of addiction medicine." Marc Gallanter, *The Impact of Managed Care on Addiction Treatment: Evaluating Physician's Views and the Value of Health Plan Benefits*, 18(4) J. ADDICTIVE DISEASES 1 (1999).

20. Amended Complaint (Aug. 1999) at 24, in *Pennsylvania Psychiatric Soc'y v. Green Spring Health Services*, (Civil Action No. 99-937) 2000 U.S. Dist. LEXIS 7953 (W.D. Pa. 2000, vacated and remanded, 280 F.3d 378, 2002 U.S. App. LEXIS 1816 (3d Cir. 2002)).

21. *Pennsylvania Psychiatric Soc'y v. Green Spring Health Services*, 2000 U.S. Dist. LEXIS 8017 (2000). Defendant's motion to dismiss was granted. *Pennsylvania Psychiatric Soc'y v. Green Spring Health Services*, 2000 U.S. Dist. LEXIS 7953 (W.D. Pa. 2000) (Civil Action No. 99-937), vacated and remanded, 280 F.3d 378, 2002 U.S. App. LEXIS 1816 (3d Cir. 2002).

two lawsuits.²² Both complaints alleged that the Green Spring medical necessity definition and medical necessity interpretive criteria were more restrictive than the medical necessity definition in the plaintiffs' policy with Blue Cross Blue Shield of Maryland (BCBSM), contracting with Green Spring for mental health utilization management (prior authorization, concurrent review and retrospective review). The following BCBSM medical necessity definition was applicable at the time when plaintiffs' causes of action arose:

Services and supplies by a provider to identify or treat an illness that has been diagnosed or is suspected. They are:

- a. consistent with:
 - (1) the diagnosis and treatment of a condition, and
 - (2) the standards of good medical practice;
- b. required for other than convenience; and
- c. the most appropriate supply or level of service.

When applied to inpatient care, the term means: the needed care cannot be safely given on other than an inpatient basis.²³

Green Spring supplemented this medical necessity definition with criteria for mental health treatment, including admission and continued stay criteria for substance abuse residential treatment. The most controversial elements were, first, a "fail first" admission requirement: "Structured professional outpatient treatment is the treatment of first choice. Residential treatment . . . should follow recent outpatient treatment in a structured professional program of significant duration and intensity during the course of which the patient has not been able to maintain abstinence for

22. Amended Class Action Complaint, *Jane Doe et al. v. Blue Cross Blue Shield of Maryland, Inc.* (Civil Action No. 183811) (Circuit Court for Montgomery County, Md., March 2000). This lawsuit for breach of contract was settled. Second Amended Complaint, *John Doe et al. v. Blue Cross Blue Shield of Maryland, Inc.*, (Civil No. L-98-121) 173 F. Supp. 2d 398 (D. Md. Sept. 2001). The complaint alleged several causes of action under ERISA such as failure to disclose, breach of fiduciary duty, and denial of benefits.

23. Second Amended Complaint at 5, *John Doe et al. v. Blue Cross Blue Shield of Maryland, Inc.*, (Civil No. L-98-121) 173 F. Supp. 2d 398 (D. Md. Sept. 2001).

a significant period of time.”²⁴ In other words, unless potentially irreparable harm to the patient’s personal and professional life had already occurred, the possibly most appropriate treatment according to “good medical practice” “would not be approved and the patient would be placed at risk for further harm.”²⁵

Second, if this requirement for residential treatment was not met, the following conditions applied: “1) patient must be residing in a *severely* dysfunctional living environment (emphasis added); or 2) there must be actual evidence for, or clear and reasonable inference of serious, imminent physical harm to self or others directly attributable to the continued abuse of substances which would prohibit treatment in an outpatient setting.”²⁶ Since all family environments of alcoholics are marked by a certain degree of impairment, the Green Spring criteria imposed further deterioration and potential irreparable harm before treatment according to good medical practice might be approved. Serious, imminent harm to self or others is an indication for involuntary commitment and as such, an excessively stringent and inappropriate standard for residential substance abuse treatment.

Third, the Green Spring Medical Necessity Criteria required the “documentation of restorative potential for the proposed admission” in cases of repeated relapses.²⁷ In other words, unless patients with a history of failed treatment compliance could prove their current ability to benefit from residential treatment, they would be assigned to a lower level of care. But “a more appropriate clinical approach would be careful assessment and identification of the barriers to recovery . . . Failure to address specific recovery barriers and match the client to appropriate services and settings only increase the human and financial cost to the client and society.”²⁸ And lastly, the criteria for continued stay required that “all of the

24. GREEN SPRING HEALTH SERVICES, INC., GSHS MEDICAL NECESSITY CRITERIA: SUBSTANCE ABUSE RESIDENTIAL TREATMENT 16 (1992, 1995) [hereinafter GSHS MEDICAL NECESSITY CRITERIA].

25. Denial of “having a problem” is common among alcoholics but whenever a patient accepts responsibility for the condition, appropriate treatment is essential for a successful outcome. Complete “remission” from alcoholism often occurs only after several failed attempts at recovery. Denying residential care may expose patients to failure at a time when they are most amenable to treatment.

26. GSHS MEDICAL NECESSITY CRITERIA, *supra* note 24, at 17.

27. *Id.*

28. LEE GARTNER & DAVID MEE-LEE, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, THE ROLE AND CURRENT STATUS OF PATIENT PLACEMENT CRITERIA IN THE TREATMENT OF SUBSTANCE ABUSE DISORDERS. 13 TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES 15, at 17 (1995).

admission criteria must be met "on a daily, continuing basis."²⁹ This requirement defies all logic of treatment—patients may not improve in order to qualify for continued residential therapy. If they responded to such a structured treatment approach which, by definition, spans a certain period of time, they were no longer eligible for continued approval of the appropriate level of care.

In 1995, the Green Spring alcohol and drug detoxification and rehabilitation criteria for utilization review were compared by Green Spring authors with the Patient Placement Criteria (PPC) of the American Society of Addiction Medicine.³⁰ While both sets of criteria dealt with level-of-care determinations for substance-abusing patients and included admission, continued stay and discharge criteria, the authors emphasized that the Green Spring medical necessity criteria were intended for utilization management while the ASAM criteria served "a broader treatment rationale and purpose."³¹ The article concluded that the ASAM criteria "are helpful in treatment planning" but in their current form "are not adequate in medical-necessity review for utilization management purposes."³² The Center for Substance Abuse Treatment (CSAT) of the U.S. Department of Health and Human Services, however, striving to lay the groundwork for the development of national uniform patient placement criteria, found that the ASAM criteria represented the "best effort to date" and provided "a solid base upon which to build."³³ The CSAT team had reviewed all available sets of public and private placement criteria for its Treatment Improvement Protocol (TIP) as both public and private treatment systems were seen as increasingly relying on PPCs. A more standardized approach was also considered advisable since most managed care organizations employed their own criteria attempting "to place patients in the least restrictive and least expensive treatment setting that is most likely to produce positive treatment outcomes."³⁴ The TIP emphasized that managed care criteria were "substantially more restrictive in regarding intensive levels of care" than the ASAM criteria. Noted advantages of the ASAM criteria were their development by consensus

29. GSHS MEDICAL NECESSITY CRITERIA, *supra* note 24, at 17.

30. Jonathan Book et al., *The ASAM and Green Spring Alcohol and Drug Detoxification and Rehabilitation Criteria for Utilization Review*, 4(3) AM. J. ON ADDICTIONS 187 (1995). Dr. Book is the current Magellan (formerly Green Spring) Medical Director in the Magellan corporate office in Columbia, Maryland.

31. *Id.* at 189.

32. *Id.*

33. GARTNER & MEE-LEE, *supra* note 28.

34. *Id.* at 11.

among a range of clinicians (even though not as broad as might ideally be desirable), their publication after extensive field review, and their high visibility in the clinical arena in general.

2. The Use of Clinical Practice Guidelines

According to the Institute of Medicine, chartered by the National Academy of Science, clinical practice guidelines (CPGs) are "systematically developed statements to assist practitioner and patient decisions about appropriate health care for specific clinical circumstances."³⁵ Currently, more than 2,200 scientifically derived guidelines have been developed by recognized scientific institutions (including the former Agency for Health Care Policy and Research AHCPR, now called Agency for Healthcare Research and Quality AHRQ³⁶) and medical specialty organizations. Their use, however, is not required by law, and MCOs are free to develop and apply their own customized guidelines.³⁷ As a MCO representative observed in response to an informal survey of the use of official practice guidelines: the AHCPR guidelines "did not seem to fit his circumstances."³⁸ Furthermore, managed care organizations, "with their commitment to the bottom line, may make modifications to guidelines to achieve their best interests and not those of the patients."³⁹ "Among these managed care guidelines, a staggering diversity reigns. Indeed, the full extent of the variety can not be known since many of them are proprietary, kept confidential partly to

35. INSTITUTE OF MEDICINE, COMM. ON CLINICAL PRACTICE GUIDELINES, CLINICAL PRACTICE GUIDELINES: DIRECTIONS FOR A NEW PROGRAM (M.J. Field & Kathleen N. Lohr, eds., 1990). The IOM definition has also been adopted by German institutions and medical specialty societies developing clinical practice guidelines.

36. AGENCY FOR HEALTH CARE POLICY AND RESEARCH, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, USING CLINICAL PRACTICE GUIDELINES TO EVALUATE QUALITY OF CARE (1995). Volume 1 contains a "List of attributes of good practice guidelines" and a twelve-point checklist for guideline development, similar to the approach developed by the German workgroup *ÄZQ*.

37. U.S. GOVERNMENT ACCOUNTING OFFICE, PRACTICE GUIDELINES: MANAGED CARE PLANS CUSTOMIZE GUIDELINES TO MEET LOCAL INTERESTS 3 (1996). More than 75% of all MCOs use at least some formally implemented guidelines. Frances H. Miller, *Medical Malpractice: External Influences and Controls—Medical Discipline in the Twenty-First Century: Are Purchasers the Answer?*, 60 LAW & CONTEMP. PROB. 31, 46 (1997).

38. Jane Sisk, *How are Health Care Organizations Using Clinical Guidelines?*, 17 HEALTH AFFAIRS, No. 5, Sept./Oct. 1999, at 91.

39. U.S. GOVERNMENT ACCOUNTING OFFICE, *supra* note 37, at 12 (quoting an anonymous expert source on guidelines).

ensure commercial salability and partly to limit physicians' ability to 'game' the system for extra benefits."⁴⁰

3. Commercial Guidelines

Managed care organizations increasingly resort to guidelines developed by actuarial firms (Milliman & Robertson, InterQual⁴¹, Value Health Services) for commercial purposes.⁴² The Milliman & Robertson (M&R) guidelines, for example, are sold to a large number of MCOs including companies such as Cigna, Prudential, United Healthcare Corp., and U.S. Healthcare.⁴³ By 1995, the firm's "Optimal Recovery Guidelines" (ORGs) were applied to the treatment of more than 50 million patients—but not without serious resistance by practitioners and the American Medical Association, dubbing the guidelines "cookbook medicine," sacrificing autonomous clinical judgment and the consideration of each patient's unique circumstances.⁴⁴ In order to avoid costly referrals to specialists or hospital stays, the extensive list of conditions to be treated by general practitioners in Volume 5, "Ambulatory, Primary and Pharmaceutical Care" (developed in focus groups of managed care primary care physicians) includes heart failure, pneumonia, and epileptic seizures. Still, the "purpose of the Guidelines is not to ration or reduce care, but rather to help minimize waste and inefficiency in the healthcare system."⁴⁵

As the company itself consistently emphasizes in its literature, its Healthcare Management Guidelines are "a set of optimal clinical practice benchmarks for treating common conditions for patients who have no complications. If you have an uncomplicated patient with a particular

40. E. Haavi Morreim, *Medicine Meets Resource Limits: Restructuring the Legal Standard of Care*, 59 U. PITT. L. REV. 1, 12 (Fall 1997) (quoting Lucian L. Leape, *Translating Medical Science Into Medical Practice: Do We Need a National Medical Standards Board?* 273 JAMA 1534, 1536 (1995)).

41. Miller, *supra* note 37, at 31, n.104.

42. An extensive search of the National Library of Medicine database revealed only a slim 1992 edition of the Milliman & Robertson Guidelines, an entry of InterQual as a publisher, and no entry of Value Health Services. (The NLM is the largest repository of scientific medical publications in the world.) All three corporations sell clinical practice guidelines for "medical review services" (the precertification and concurrent review of individual patients' medical care) to large managed care corporations.

43. Morreim, *supra* note 40, at 11, n.28. Since then, some of these corporations have merged with other MCOs.

44. Allen R. Myerson, *Helping Health Insurers Say No*, N.Y. TIMES, March 20, 1995, at D1. Most M&R documents emphasize, however, that the guidelines should be adapted to local standards and are not intended to supplant clinical expertise.

45. MILLIMAN & ROBERTSON, INC., HEALTHCARE MANAGEMENT GUIDELINES, QUESTIONS AND ANSWERS 3 (Apr. 1998).

illness, here is the most-efficient, demonstrated-quality course of treatment.”⁴⁶ “Eighty percent of under-age 65 cases and 40% to 50% of over-age 65 cases are generally considered uncomplicated.”⁴⁷ This approach completely ignores the considerable incidence of comorbidity, especially among the elderly.⁴⁸ As one physician commented, “The standards take an absurdly optimistic approach. If all the stars are aligned in the heavens and everything turns out just right, what is the least we can do?”⁴⁹

In some cases, it appears that health plan guidelines are based not even on average needs but on the needs of patients in the best of circumstances. For example, in developing benchmarks to which managed care plans should strive, the consulting company Milliman & Robertson based its benchmarks on the experiences of the 10% of patients in each type of treatment who needed the least amount of care. Thus, if experience showed that 10% of patients could be discharged within one day of an appendectomy, the benchmarks set a goal for discharging appendectomy patients within one day of their surgery.⁵⁰

Empirical studies have supported the contention that only 10% of all hospital treatments provided meet the M&R guideline goals.⁵¹

With hospitalization the most expensive component of health care, guidelines focus on the projected length-of-stay for “the entire spectrum of medical and surgical patients—regardless of the severity of the condition so

46. *Id.* at 1.

47. *Id.* at 2.

48. No guidelines adjusted for comorbidity are provided. Indeed, when developing scientifically valid guidelines for treatments of specific conditions, comorbidity should be excluded to prevent the results from being confounded by the effects of coexistent illnesses and the interaction of multiple treatments. But the Milliman & Robertson estimates of “uncomplicated” cases, especially among those over age 65, are excessive, making the guidelines next to useless and potentially damaging for patients. See generally MILLIMAN & ROBERTSON, INC., *supra* note 45.

49. Myerson, *supra* note 44, at C1 (quoting Gary S. Dorfman, medical society officer and in charge of quality and cost control at Rhode Island Hospital).

50. David Orentlicher, *Paying Physicians More to Do Less: Financial Incentives to Limit Care*, 30 U. RICH. L. REV. 155, n.71 (1996). (quoting Greg Borzo, *R.I. Doctors Face “Absurd” Inpatient Limits*, AM. MED. NEWS, Mar. 21, 1994, at 1, 9).

51. Hirshfeld et al., *Structuring Provider-Sponsored Organizations: The Legal and Regulatory Hurdles*, 20 J. LEGAL MED. 11 (1999).

long as the patient does not develop complications.”⁵² In 1997, the company, supporting its conclusion with six pages of tables, reported that new mothers should be able to be released from the hospital twenty-four hours after an uncomplicated vaginal delivery, and forty-eight hours after a Cesarean.⁵³ The report added that no health status information on mother and newborn nor on post-discharge medical care provided had been considered, but that “such post-discharge care is likely included as medically appropriate for short-stay patients.”⁵⁴ In 1999, the Third Circuit Court of Appeals, in *In re U.S. Healthcare*,⁵⁵ upheld the lower court’s ruling that the twenty-four hour contractual coverage limitation of hospitalization after delivery was a quality of care issue, and thus outside of the scope of the ERISA preemption. Furthermore, the refusal of a requested home visit by a nurse, a covered benefit, was also considered—a novum for any court!—a violation of the standard of care. Since the MCO had acted as a “medical provider”, it was not immune to state law medical malpractice claims. Today, forty-two states prohibit “drive-through” deliveries,⁵⁶ and President Clinton’s Newborns’ and Mothers’ Health Protection Act of 1996 has been in effect since January 1, 1998.⁵⁷

4. Guideline Development

How are the Milliman & Robertson guidelines developed? Precise information on the data entering into the guidelines have been difficult to obtain since M&R has limited itself to general statements only. In spite of its claims that “guidelines are developed in accordance with the principles

52. HEALTHCARE MANAGEMENT GUIDELINES, QUESTIONS AND ANSWERS, *supra* note 45, at 6.

53. Frederick W. Spong and Dennis J. Hulet, MILLIMAN & ROBERTSON, INC., RESEARCH REPORT: HEALTH STATUS IMPROVEMENT AND MANAGEMENT HSIM EXTRACT #1 – INPATIENT CARE FOR MOTHERS AND NEWBORNS (1997). The American College of Obstetricians and Gynecologists recommends two days for uncomplicated births and four days for Cesarean sections. German women currently spend an average of four days in the hospital for uncomplicated deliveries.

54. *Id.* at 4.

55. *In re United States Healthcare*, 1999 U.S. App. LEXIS 22464. *U.S. Healthcare Inc. v. Steven Bauman*, 193 F.3d 151 (3d Cir. 1999), *cert. denied*, 68 U.S.L.W. 3552 (U.S. June 19, 2000) (Civil Action No. 99-1383). The newborn Michelina had died of an undiagnosed meningitis the day after she and her mother had been discharged from the hospital 24 hours after delivery.

56. See 2001 STATE GUIDE TO MANAGED CARE LAW, *supra* note 13, at §3.2.

57. *Id.* The Act mandates a minimum stay of 48 hours after a normal vaginal delivery, and a minimum of 96 hours after a Cesarean. Furthermore, no health plan approval is required.

of evidence-based medicine, employing the current best evidence,”⁵⁸ none of the details customarily provided for scientifically derived clinical practice guidelines are made available. Medical literature, especially randomized controlled trials and observational studies in peer-reviewed literature are cited as sources.⁵⁹ But how such data are then aggregated to arrive at the guidelines remains a mystery.⁶⁰ Another source of data for guideline development are utilization review organizations, MCOs and chart reviews of managed care providers.⁶¹ This method relies on insurers’ own decisions instead of scientifically obtained material.⁶² Since all MCOs strive to prevent health care costs from rising by applying increasingly stringent standardized criteria, and their data are returned into the feedback loop for guidelines updates, the standard of care follows the downward spiral.

As M&R admits, the guidelines are targeted at the “financial viability” of the health care system. Actuaries

help measure the financial risks associated with the delivery of health care (e.g. utilization rates, costs, trends, identification of opportunity, volatility, and risk). Actuaries and clinicians together identify the clinical and financial opportunities available, translate these opportunities into specific clinical practices, and measure the financial impact of changes.⁶³

58. James M. Schibanoff, MILLIMAN & ROBERTSON, INC., HEALTHCARE STATUS IMPROVEMENT & MANAGEMENT, PEDIATRIC HSIM, (1998).

59. *Id.*

60. For further discussion, *see id.* at 33.

61. HEALTHCARE MANAGEMENT GUIDELINES, QUESTIONS AND ANSWERS, *supra* note 45, at 6.

62. E. Haavi Morreim, *Playing Doctor: Corporate Medical Practice and Medical Malpractice*, 32 U. MICH. J.L. REFORM 939, 983 (1999).

63. HEALTHCARE MANAGEMENT GUIDELINES, QUESTIONS AND ANSWERS, *supra* note 45, at 6. The 2001 edition of *The Managed Health Care Handbook*, edited by a partner in the accounting firm of Ernst & Young “with one of the largest health care consulting practices in the United States”, contains three chapters contributed by authors from Milliman & Robertson. The author of “Actuarial Services in an Integrated Delivery System” discusses how to aid HMOs to select providers to include or exclude from contracting, how to design incentive structures to make regular, budgeted payments or periodic bonus payments to providers from integrated delivery system gains, the design and determination of the value of various provider capitation arrangements, the establishment of financial benchmarks for future measurement, and the quantification of “medical management policy.” Stephen M. Cigich, *Actuarial Services in an Integrated Delivery System*, in *THE MANAGED HEALTH CARE HANDBOOK* 971 (Peter R. Kongstvedt, ed.) (2001).

In 1995, eighteen in-house consultants, nine physicians and nine nurses, "having plenty of clinical and administrative experience especially at health maintenance organizations," were writing new standards and revising existing ones.⁶⁴ Proposed standards were submitted for review to physicians working for health plans relying on the M&R guidelines but not to medical societies "whose recommendations are invariably more generous than Milliman's."⁶⁵ On June 13, 2000, the American Medical Association House of Delegates adopted Resolution 822, introduced by the New York Delegation, and formally rejected "the Milliman & Robertson Guidelines as the clinical standard of care."⁶⁶

5. The Application of Commercial Guidelines

"Some health plans are apparently using the Milliman & Robertson recommendations as guidelines that should be followed for all patients, unless an extension is justified, rather than as an aspirational benchmark."⁶⁷ In *Batas v. Prudential*, the plaintiffs alleged the formal guideline application to virtually all subscribers to deny coverage, and without consideration of the treating physicians' clinical judgment, despite M&R's caveat that the guidelines are not intended as exclusive criteria.⁶⁸ Humana documents obtained through discovery in cases against Humana Health Insurance and Humana Inc. confirm the trend towards rigid guideline use.⁶⁹

64. Myerson, *supra* note 44, at C1. ~

65. *Id.*

66. American Medical Association House of Delegates (A-00), Report of Reference Committee H, HOD Action: Original Resolution 822 (Rejection of Milliman & Robertson as Standard of Care).

67. Orentlicher, *supra* note 50, at n.71 (quoting PRIVATE SECTOR ADVOCACY AND SUPPORT TEAM, AM. MED. ASS'N., MANAGED CARE AND THE MARKET: A SUMMARY OF NATIONAL TRENDS AFFECTING PHYSICIANS 2 (2d ed. 1995)).

68. Plaintiff's Surreply in Opposition to Defendant's Motion to Discuss the Class Action Complaint at 17 (August 1997), in *Batas v. The Prudential Ins. Co. of Am.*, (N.Y. App. Div., Dept. 1, Index No. 97-107881, IAS Part 49) (filed 1997), *aff'd in part, rev'd in part by Batas v. The Prudential Ins. Co. of Am.*, 281 A.D.2d 260 (N.Y. App. Div. 2001), *motion granted by Batas v. The Prudential Ins. Co. of Am.*, 721 N.Y.S.2d 856 (N.Y. App. Div. 2001).

69. *Chipps v. Humana Health Ins. Co. of Fla.*, (15th Jud. Cir., Palm Beach County, Fla.) (Case No. CL 96-00423 AE) (unreported, filed 1996). The jury awarded the plaintiff \$80 million, and the case was appealed to the Fourth District Florida Court of Appeals. *Humana Health Ins. Co. of Fla. v. Chipps*, 748 So.2d 280 (Fla. 4th DCA 1999)(No. 00-866), *reh'g den.* Oct. 12, 1999, *aff'd in part, rev'd, and remanded by Humana Health Ins. Co. of Fla. v. Chipps*, 802 So.2d 492 (Fla. 4th DCA 2001). *Price et al. v. Humana Inc.*, (S.D. Fla.) (Case No. 9:99-8763 CIV-Moreno) (unreported, filed 1999), *transferred and consolidated In re Humana Inc. Managed Care Litig.*, 2000 U.S. Dist. LEXIS 5099 (2000), *aff'd* 2002 U.S. App. LEXIS (11th Cir. 2002).

After the quarterly earnings of Humana had dropped sharply in early 1995, the company called in the auditing firm Coopers & Lybrand for a utilization management program audit. The Humana utilization management program is centrally administered out of Louisville, Kentucky. Its main components are pre-admission review, telephone pre-certification, concurrent review, case management and written prior authorization. Pre-admission review is conducted by admission coordinators, registered nurses (RNs), licensed practical nurses (LPNs), and supervisors. The Coopers & Lybrand report on the effectiveness of the utilization management program recommended, among other procedures, the more stringent use of commercial guidelines. In order to seize the "tremendous opportunity" of generating additional savings, the patient care coordinators (PCCs), performing concurrent review, should be trained to be more "proactive and aggressive when discussing 'questionable' cases with physicians, and use more aggressive utilization criteria, such as M&R for LOS [length-of-stay] and InterQual for continued stay review *across all markets*."⁷⁰ Furthermore, the nurses' role should be expanded by assigning M&R LOS guidelines for internal management purposes, and by more aggressively addressing "all questionable treatment issues" during the initial contact.⁷¹ "Policies for discharge planning and case management should be reviewed, revised if necessary and reinforced with nurses during training. The revised program should be supported by performance criteria and incentives for the nurses."⁷²

For on-site concurrent review (OSCR), Coopers & Lybrand found that medical necessity criteria were not applied consistently across all markets: Chicago used InterQual SI/IS (severity of illness/intensity of symptoms) criteria while Louisville employed the M&R guidelines. The report recommended more "aggressive" utilization of such criteria for LOS goals, for admission reviews and for continued stay review across all markets was therefore recommended; training OSCR nurses in a "more aggressive review approach"; and developing an "aggressive discharge planning policy that supports the treatment of patients in alternative settings even when in-patient criteria are met."⁷³ The Executive Summary

70. COOPERS & LYBRAND L.L.P., UTILIZATION MANAGEMENT FINAL REPORT 3 (Oct. 17, 1995) (emphasis added) [hereinafter COOPERS & LYBRAND FINAL REPORT].

71. *Id.*

72. *Id.* at 5.

73. *Id.* at 24. The report went on to outline several "corporate issues" needing to be addressed in order to improve the financial performance of the organization. "Many managed care organizations have contractual language which stipulates they will not pay for the admission

concluded that Humana had available a number of opportunities to improve its competitive position through enhanced utilization performance.

Some of these recommendations require a cost benefit analysis before implementation to document the potential financial savings. The process could benefit from a true Business Process Reengineering redesign. The efficiencies gained would then free up existing resources which could be dedicated to the implementation of some of the recommendations in this report which will require additional staffing.”

By 1997, the Utilization Management Plan Description for San Antonio and Other Markets listed both M&R Guidelines and InterQual Criteria as inpatient and ambulatory care review decision protocols and criteria for the appropriateness of medical services.⁷⁵ These standards were to be used during review for admission criteria, concurrent review, discharge planning, and the authorization of referrals to specialists and of special procedures. For prior authorization and pre-certification of elective admissions, medical necessity and admission appropriateness were to be determined by the use of “objective criteria” such as M&R and InterQual. Under the concurrent review process, admission and continued stay review relied on M&R Guidelines and InterQual SI/IS criteria for the determination of medical necessity. Concurrent reviews were conducted at specified intervals throughout the in-patient stay, assessing the member’s need for hospitalization by “using pre-established objective criteria (InterQual, M&R, and Coverage and Referral Standards).”⁷⁶ “High quality care” is to be assured through “generic outcome screens.”⁷⁷

According to the Humana Medical Plan Utilization Management Policy & Procedure Manual for the Northeast Florida market in effect until January 1, 1997, the utilization management of mental health services, delegated to Merit Behavioral Care, was to be monitored by Humana using

even if it was medically necessary when the hospital fails to fulfill its notice obligations. Humana should consider adding such language to its new ‘boiler plate’ contracts and investigate the feasibility of administering the new policy under its existing agreements. COOPERS & LYBRAND FINAL REPORT, *supra* note 70, at 6.

74. *Id.* at 7.

75. HUMANA HEALTH CARE, HUMANA HEALTH CARE PLAN—SAN ANTONIO AND OTHER DESIGNATED MARKETS—UTILIZATION MANAGEMENT PLAN DESCRIPTION (as approved Mar. 28, 1997) (see Chapter entitled “Screening Criteria” at page 12).

76. *Id.* (see Chapter entitled “Targeted Utilization Management Strategic Plan” at page 13-16).

77. *Id.*

InterQual and M&R Guidelines for the review of 100% of mental health and substance abuse admissions.⁷⁸ The inpatient UM process (for concurrent, prospective, and retrospective medical necessity review) required PCCs to be “thoroughly familiar with InterQual and M&R criteria and their applications.”⁷⁹ PCCs were to review patients’ conditions by applying appropriate InterQual criteria and M&R Guidelines “to determine medical necessity of the admission and appropriateness of the acute setting for concurrent stay review (see InterQual Criteria & M&R Guidelines Manual). [PCC] enters M&R Optimal Recovery Guidelines and assigns LOS. Enters AHDs (Avoidable Hospital Days).”⁸⁰ Among the PCC review activities, the Policies & Procedures Manual lists “onsite admission/subsequent review of the medical record applying appropriate InterQual criteria and M&R Guidelines to determine medical necessity of the admission and appropriateness of the acute care setting.”⁸¹ Cases not meeting the “IS/SI (sic) discharge screens” were to be referred to Medical Directors or PAs (physician advisors). Continued stay reviews were to be conducted Monday through Friday, and results obtained by applying the above guidelines were to be documented.⁸² The Utilization Medical Director’s tasks included the determination of hospital discharges, and “at least bi-weekly ‘grand rounds’ for the review of all inpatients in greater than ten days, all catastrophic cases, and all cases where Market Medical Director intervention may result in more effective utilization, utilizing UM/MD (utilization management/medical director) and Daily Utilization Management Report (DUMR).”⁸³ If the Medical Director determined that “discharge screens are not met,” concurrent reviews were to be continued daily while all information and actions regarding the case were to be documented in Medical Services Review (MSR) “using SI/IS criteria including admission criteria/discharge plan, M&R Criteria and ORGs (optimal recovery guidelines) and LOS.”⁸⁴

78. HUMANA HEALTHCARE, INC., HUMANA MEDICAL PLAN UTILIZATION MANAGEMENT POLICY & PROCEDURE MANUAL FOR THE NORTHEAST FLORIDA MARKET 2/2 (in effect until Jan. 1997) [hereinafter POLICY & PROCEDURE MANUAL FOR THE NORTHEAST FLORIDA MARKET].

79. *Id.* at 1/7.

80. *Id.* at 2/7.

81. *Id.* at 3/7.

82. *Id.* at 4/7.

83. POLICY & PROCEDURE MANUAL FOR THE NORTHEAST FLORIDA MARKET, *supra* note 78, at 4/7.

84. *Id.* at 6/7.

In its Utilization Management Report for the Kansas City and Louisville "markets," Coopers & Lybrand related that "the case managers are not referring to the M&R guidelines during their inpatient rounds. The case managers use their own judgment in making decision."⁸⁵ In order to remedy the situation, it was recommended to "reemphasize the use of M&R and InterQual guidelines during concurrent review to ensure process is objective as opposed to subjective", and to "document when criteria is not met and state rationale when LOS exceeds M&R."⁸⁶ Another finding was that "PCCs report that network physicians are not supportive and in some cases are openly hostile to utilization management initiatives."⁸⁷ It was recommended to "conduct focused educational programs with network physicians that stress the importance of their cooperation with utilization management initiatives."⁸⁸ The Executive Summary emphasized that "PCCs attach M&R guidelines to patient charts. PCCs report that physicians remove the guidelines and/or write inappropriate comments in response. The Medical Director should establish an intervention with uncooperative physicians to resolve this situation. Uncooperative physicians should be identified and the Medical Director should communicate Plan expectations."⁸⁹

In her trial testimony,⁹⁰ Linda Peeno, M.D., a former medical reviewer/physician advisor with Humana who also worked as case management reviewer for Blue Cross in a hospital setting,⁹¹ commented on the above Coopers & Lybrand audits and recommendations during cross examination:

Q. Is there something inherently wrong with a health care provider, like a hospital or a health insurer, employing accountants to help them be efficient?

85. COOPERS & LYBRAND L.L.P., HUMANA UTILIZATION MANAGEMENT DRAFT REPORT, REGION II, KANSAS CITY AND LOUISVILLE MARKETS 24 [hereinafter HUMANA UTILIZATION MANAGEMENT DRAFT REPORT, KANSAS CITY AND LOUISVILLE].

86. *Id.*

87. *Id.* at 28.

88. *Id.*

89. *Id.* at 12.

90. *Chipps v. Humana Health Ins. Co. of Fla.*, (15th Jud. Cir., Palm Beach County, Fla.) (Case No. CL 96-00423 AE) (unreported, filed 1996). See also *supra* note 69.

91. Dr. Peeno resigned because "I was concerned about the entire way the whole health system was evolving, and I wanted to do something about the consequences to patients." Record at 1901, in *Chipps v. Humana Health Ins. Co. of Fla.*, (15th Jud. Cir., Palm Beach County, Fla.) (Case No. CL 96-00423 AE) (unreported, filed 1996). See also *supra* note 69.

A. Yes. The way Humana did it with the Coopers & Lybrand audit, there was something inherently wrong with it.

Q. And you know more than Coopers & Lybrand does, right, in terms of their recommendations as to efficiency?

A. Yes. I know that they're an accounting firm that comes in and does an audit of how these utilization management procedures function, and the audit constitutes what is the denial rate and how much money are you saving, and what you do to save more money. And I read through the voluminous report, and there wasn't a single sentence in this entire report that addressed how patients were being cared for, it was all cost driven. So yes, there is something inherently wrong with having an accounting firm come in and tell Humana how to take care of its patients, when it's all cost driven.

Q. Do you know how many doctors were employed by Coopers & Lybrand for their aid and assistance in the audit that was performed on behalf of Humana?

A. No, not exactly. I'm sure several though.

Q. So there were obviously medical people involved, not just accountants. You understand that, do you not?

A. Well, that's kind of a bizarre notion to have medical doctors working for an accounting firm anyway, so I mean, I think that's an inherent conflict.

Q. Well, you have accountants working for the hospital with which you're affiliated. That's no less bizarre, is it?

A. The accountants aren't at the bedside of patients and telling doctors what to do and making judgments about how doctors are practicing medicine.

What I think happened was they came in, they went to the utilization management department, they said okay, how many denials, what's your percent of denials? Well, that's not high enough, that's not industry standard, so let's decrease or increase the rate of denials, let's decrease how many people you admit to the hospital, let's decrease how many days they stay.

And then they went through and calculated and produced a mechanism to do that. They might as well have been standing by the bedside telling the patients they couldn't come into the hospital, they had to leave.⁹²

On re-direct examination:

Q. Dr. Peeno, if Humana was truly, truly concerned with the quality of care of its members, how would a cost benefit analysis apply?

A. It wouldn't. I mean, they would be doing something different, they would be looking at the care of patients, not just the cost.

Q. Would one associate cost benefit analysis with a 'machinery of denial' and treating people like nothing more than widgets moving down an assembly line?

A. That's exactly—I mean, it's just like a factory. You do a cost benefit analysis, we're going to hire these new people, and what they're going to do is this is going to justify the money we make or the money we lose. I mean, it's all cost based.

Q. And let's look at some of the issues that corporate was reviewing, corporate issues [refers to notice provision in new boiler-plate contracts that Humana will not pay for a hospital admission if the hospital failed to fulfill its notice obligation, regardless of medical necessity].

92. Record at 1904-1907, in *Chippis v. Humana Health Ins. Co. of Fla.*, (15th Jud. Cir., Palm Beach County, Fla.) (Case No. CL 96-00423 AE) (unreported, filed 1996). See also *supra* note 69.

A. This is clearly they're not acting in the best interests of the patient. That's a little financial technicality that they can create in order to avoid some of the hospital costs.⁹³

6. Commercial Guidelines in the Court Room

Because of the ways commercially sold guidelines are developed and used, they are now cited in numerous lawsuits as violating the medical necessity standard promised to subscribers in managed care plan documents. In *Weiss v. CIGNA*, general allegations were made that the "highly controversial" actuarial M&R guidelines had been improperly used for medical determinations instead of generally accepted standards, as required by the plaintiff's plan.⁹⁴ The judge, however, dismissed the breach of contract claim since Weiss had not alleged that "CIGNA relies on such guidelines to the exclusion of other factors," nor had she alleged an "injury in fact" arising from the company's medical necessity determinations departing from "generally accepted medical standards." Therefore, the case or controversy requirement for an ERISA §502(a) claim had also not been met. Since then, claims detailing the exclusive use of the guidelines and the scientific inadequacy of their development resulting in standard of care violations have become increasingly specific.

The complaint filed in *Price v. Humana Inc.*, one of several class action suits against managed care corporations consolidated for multidistrict pretrial proceedings in the Southern District of Florida,⁹⁵ referred to "undisclosed cost-based criteria" used by the MCOs in place of or in addition to the medical necessity criteria set forth in the health plan documents. It alleged actionable material omissions and misrepresentation to the class in that the M&R guidelines, InterQual and Value Health Services (VHS) guidelines and criteria were used for the approval or denial of benefit claims. The complaint further alleged that such guidelines were developed by third parties for the purpose of reducing the utilization rates of care, and were used by Humana without regard to actual medical

93. *Id.* at 1935, 1936.

94. *Weiss v. CIGNA Healthcare Inc.*, 972 F. Supp. 748, 755 (S.D.N.Y. 1997).

95. The defendants are Humana Inc., Aetna Inc., Aetna U.S. Healthcare Inc., CIGNA Corp., Prudential Ins. Co., PacifiCare, and United HealthGroup, Inc. On Oct. 23, 2000, the Judicial Panel on Multidistrict Litigation ordered the consolidation of all actions into MDL-1334—*In re Humana Inc. Managed Care Litigation*. *In re Humana Inc. Managed Care Litigation*, 2000 U.S. Dist. LEXIS 5099 (2000).

necessity.⁹⁶ Disclosure documents were found devoid of information concerning subcontracts with third parties such as VHS, using more restrictive criteria for payment eligibility determinations for certain medical conditions and procedures than the Humana medical necessity criteria.⁹⁷

The Reply Memorandum in Support of Plaintiff's Motion for Class Certification⁹⁸ listed exhibits indicating the following: "Milliman & Robertson guidelines are used in the review process across all markets,"⁹⁹ "It is the policy of the Utilization Management Department to assure that concurrent review data entry is relevant, concise, and based on criteria developed by Milliman & Robertson or Interqual Criteria,"¹⁰⁰ "Humana's registered nurses use Interqual criteria for medical necessity review,"¹⁰¹ Value Health makes coverage determinations based on "*clinical standards of care* (emphasis added) developed by VHS and its medical advisors,"¹⁰² "VHS estimates that the Medical Review System saved its clients \$67.5 million in 1995. The MRS consistently resulted in a direct savings of approximately 9% after physician review,"¹⁰³ "A preadmission review nurse . . . compares the indications for hospital admission or surgery with nationally-established medical/surgical screening criteria to determine medical necessity."¹⁰⁴ The Humana Job Description of a Patient Care Coordinator in Medical Services includes: "Perform daily admission and concurrent review for hospitalized patients using standard review criteria to

96. Complaint at 40-41, 46, in *Price et al. v. Humana Inc.*, (S.D. Fla.) (Case No. 9:99-8763 CIV-Moreno) (unreported, filed 1999), *transferred and consolidated In re Humana Inc. Managed Care Litig.*, 2000 U.S. Dist. LEXIS 5099 (2000), *aff'd* 2002 U.S. App. LEXIS (11th Cir. 2002).

97. *Id.* at 42.

98. Documents include Reply Memorandum of Law in Support of Plaintiff's Motion for Class Certification, Attachment 1 to Reply Memorandum, Exhibits to First Amended Complaint and Plaintiff's Memorandum in Support of Class Certification in *Price et al. v. Humana Inc.*, (S.D. Fla.) (Case No. 9:99-8763 CIV-Moreno) (unreported, filed 1999), *transferred and consolidated In re Humana Inc. Managed Care Litig.*, 2000 U.S. Dist. LEXIS 5099 (2000), *aff'd* 2002 U.S. App. LEXIS (11th Cir. 2002).

99. *Id.* at Appendix Exhibit 5 (Coopers & Lybrand Utilization Management, Aug. 14, 1996, at 9).

100. *Id.* at Appendix Exhibit 28 (Humana Health Care Plans Policies/Procedures. Documents Concerning Humana's Use of Undisclosed Cost-Based Criteria).

101. *Id.* at Appendix Exhibit 5 (Coopers & Lybrand Humana Medical Affairs Department Review, Nov. 21, 1996, at 14).

102. Reply Memorandum of Law in Support of Plaintiff's Motion for Class Certification, *supra* note 98, at Appendix Exhibit 5 (Humana Inc. and Value Health Services Medical Review System Agreement, Nov. 15, 1990, at 2).

103. *Id.* (Value Health Sciences Corporate Overview, 1997).

104. *Id.* (Humana Physician's Administration Manual, GL-2, May 1996).

determine the medical necessity and appropriateness of care. A PCC must have an active LPN/RN [licensed practical nurse/registered nurse] license, BSN preferred,"¹⁰⁵ "Primary care physicians receive regular reports outlining the utilization of health care services for their patient panel . . . Profiles are developed to identify aberrant practice patterns and who may require orientation, counseling, education, corrective actions or sanctions,"¹⁰⁶ and

The *physician targeting program* [emphasis added] selects HMO primary care physicians or staff model centers where the inpatient utilization exceeds preestablished norm . . . The performance of the targeted physicians is reviewed every four to six weeks by Dr. Langford [sic] . . . The Executive Director and Medical Director of each market are then notified about which physicians are on the target lists.¹⁰⁷

In *Batas, Vogel v. Prudential*,¹⁰⁸ a class action suit currently before the Appellate Division, New York Supreme Court, the complaint on behalf of all subscribers of health care plans offered by Prudential alleged that the MCO breached its contract with subscribers by using medical necessity determination procedures, based on the M&R length-of-stay criteria,¹⁰⁹ and in violation of the prevailing standard of care, expressly or impliedly promised in the subscriber agreements. In the agreement entered into by Musette Batas, representative of the standard contracts for Prudential

105. *Id.*

106. *Id.* (Utilization Management Plan Description, 1997, at 26).

107. Reply Memorandum of Law in Support of Plaintiff's Motion for Class Certification, *supra* note 98, at Appendix Exhibit 5 (Coopers & Lybrand Humana Utilization Management Program, at 15).

108. *Batas v. The Prudential Ins. Co. of Am.*, (N.Y. App. Div., Dept. 1, Index No. 97-107881, IAS Part 49) (filed 1997), *aff'd in part, rev'd in part by Batas v. The Prudential Ins. Co. of Am.*, 281 A.D.2d 260 (N.Y. App. Div. 2001), *motion granted by Batas v. The Prudential Ins. Co. of Am.*, 721 N.Y.S.2d 856 (N.Y. App. Div. 2001).

109. Prudential entered into licensing agreements with M&R in 1992 and 1995, eventually comprising all guideline volumes and their electronic versions. See Letter from M&R to Steven Udvarhelyi, M.D., Vice President, Medical Services, The Prudential Insurance Company of America (Feb. 26, 1992), Letter from M&R to Kay Volkert, Manager, Medical Services, Utilization Management, The Prudential Insurance Company of America (Oct. 13, 1995), Memorandum of Law in Support of Motion for Class Certification, at 5, n.6 (Sept. 21, 1999), all available in *Batas v. The Prudential Ins. Co. of Am.*, (N.Y. App. Div., Dept. 1, Index No. 97-107881, IAS Part 49) (filed 1997), *aff'd in part, rev'd in part by Batas v. The Prudential Ins. Co. of Am.*, 281 A.D.2d 260 (N.Y. App. Div. 2001), *motion granted by Batas v. The Prudential Ins. Co. of Am.*, 721 N.Y.S.2d 856 (N.Y. App. Div. 2001).

plans, services and supplies not needed nor appropriately provided were excluded from coverage. The contract specified:

For the purposes of this exclusion, a service will be considered both "needed and appropriately provided" if PruCare determines that it meets each of the following requirements:

It is furnished or authorized by a Participating Physician for the diagnosis or the treatment of a sickness or injury or for the maintenance of a person's good health [emphasis added].

The prevailing medical opinion within the appropriate specialty of the United States medical profession that it is safe and effective for its intended use, and that its omission would adversely affect the person's medical condition [emphasis added].

*It is furnished by a provider with appropriate training, experience, staff and facilities to furnish that particular service or supply [emphasis added].*¹¹⁰

The contract also listed the sources to be relied on when determining whether the above requirements have been met: published authoritative medical literature; regulations and reports issued by government agencies such as the Agency for Health Care Policy and Research (AHCPR),¹¹¹ the National Institutes of Health (NIH), the Food and Drug Administration (FDA); and listings in the American Medical Association Drug Evaluations, and The United States Pharmacopeia Dispensing Information.¹¹²

The lower court upheld the fraud and breach of contract claims against Prudential. The complaint, distinguishing the case from *Weiss v. CIGNA*,¹¹³ detailed the alleged exclusive use of the M&R guidelines for medical necessity determinations in spite of the actuarial firm's statement that they are not intended to replace the treating physician's clinical

110. *Id.* at 3.

111. Now the Agency for Healthcare Research and Quality (AHRQ).

112. Reply Memorandum of Law in Support of Plaintiff's Motion for Class Certification, *supra* note 98, at Appendix Exhibit 28 (Humana Health Care Plans Policies/Procedures. Documents Concerning Humana's Use of Undisclosed Cost-Based Criteria, at 3).

113. *Weiss*, 972 F. Supp. 748.

judgment.¹¹⁴ Furthermore, it alleged that the guidelines were rigidly applied by a Prudential concurrent review nurse to limit the plaintiffs' hospital length-of-stay without consideration of her individual circumstances, and against the vehement opposition of the attending physicians, "participating physicians" under the plan. The Memorandum of Law in Support of the Motion for Class Certification also alleged that Prudential adopted a company-wide policy for its utilization review staff for all plans to rely on the M&R guidelines,¹¹⁵ and conducted uniform training for guideline use.¹¹⁶ Preauthorization personnel was held to evaluate the medical necessity of hospital admission "by using the M&R guidelines and the Prudential Medical/Surgical guidelines," then to use "M&R guidelines to determine appropriateness of setting and length of stay (LOS)."¹¹⁷ Once a patient was hospitalized, concurrent review nurses were to decide whether the preauthorized length of stay may be exceeded. When making such medical necessity determinations, the nurses could consult with Prudential Medical Directors who orally confirmed "denials of care without examining any medical records, examining the patients or consulting with the patient's treating physician."¹¹⁸ Medical Directors were authorized to deny care based on the M&R guidelines for cases outside of their own specialty: a psychiatrist refused to extend Ms. Vogel's hospitalization after she had undergone a complicated hysterectomy for the removal of uterine tumors, weighing over three-and-a-half pounds.

The decision to discharge Ms. Vogel only two days after her hysterectomy (in agreement with the M&R recommendation) was opposed by Dr. Vetere, Ms. Vogel's attending surgeon, a gynecologist with 20 years of surgical experience and Assistant Professor of Clinical Obstetrics and Gynecology at the State University of New York at Stony Brook.

114. *Batas v. The Prudential Ins. Co. of Am.*, (N.Y. App. Div., Dept. 1, Index No. 97-107881, IAS Part 49) (filed 1997), *aff'd in part, rev'd in part by Batas v. The Prudential Ins. Co. of Am.*, 281 A.D.2d 260 (N.Y. App. Div. 2001), *motion granted by Batas v. The Prudential Ins. Co. of Am.*, 721 N.Y.S.2d 856 (N.Y. App. Div. 2001).

115. *supra* note 94, at 5.

116. *Id.* at 6.

117. "Operating Procedures, Preauthorization of Schedule Inpatient Services" for PruCare of New York, New Jersey and Connecticut (Apr. 17, 1996). Memorandum of Law in Support of Motion for Class Certification at 6 (Sept. 21, 1999). Both available in *Batas v. The Prudential Ins. Co. of Am.*, (N.Y. App. Div., Dept. 1, Index No. 97-107881, IAS Part 49) (filed 1997), *aff'd in part, rev'd in part by Batas v. The Prudential Ins. Co. of Am.*, 281 A.D.2d 260 (N.Y. App. Div. 2001), *motion granted by Batas v. The Prudential Ins. Co. of Am.*, 721 N.Y.S.2d 856 (N.Y. App. Div. 2001).

118. Reply Memorandum of Law in Support of Plaintiff's Motion for Class Certification, *supra* note 98, at Appendix Exhibit 5 (Coopers & Lybrand Humana Utilization Management Program, at 15).

A surgical case with Ms. Vogel's specific circumstances is at increased risk for significant postoperative complications Although one or two of these complications might be evident with 48 hours of surgery, the vast majority will not produce signs of symptoms for at least four to five days postoperatively."¹¹⁹

Generally accepted medical practice following Ms. Vogel's complicated surgery required "around the clock monitoring and evaluation by experienced gynecological nurses and resident gynecological physicians in addition to the one or two daily postoperative visits made by the attending surgeon" for at least five days. According to Dr. Vetere, such care is essential because the patient may develop complications not amenable to self-diagnosis, leading to costly delays of the needed medical attention.¹²⁰

In the course of the appeals procedure initiated by Ms. Vogel, Dr. Vetere was informed by the Chief Medical Officer of Prudential that the company, based exclusively on the M&R guidelines, had preauthorized a two-day hospitalization for a total abdominal hysterectomy.¹²¹ Prudential's refusal to continue coverage after two days complied with the Concurrent Review Nurse's decision. "Remarkably, no effort was made to either examine the patient or discuss her condition with me."¹²²

Aside from the fact that I disagreed with the medical conclusions reached by Prudential's Concurrent Review Nurse concerning the medical needs of my patient, I also object to the process used by Prudential for reaching and implementing this decision. In particular, it is a gross violation of acceptable medical protocols for a medical necessity determination such as this to be made by

119. "These complications include, but are not limited to, postoperative hemorrhage, including retroperitoneal and/or wound hematoma (with or without infection), seroma, bowel and bladder dysfunction, wound infection, wound separation, pelvic cellulitis, tubo-ovarian abscess, and pelvic thrombophlebitis with or without pulmonary embolism. Although most of these complications are uncommon, some are life-threatening if not discovered and treated early." Affidavit of Patrick F. Vetere in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss, at 4 (July 30, 1997), in *Batas v. The Prudential Ins. Co. of Am.*, (N.Y. App. Div., Dept. 1, Index No. 97-107881, IAS Part 49) (filed 1997), *aff'd in part, rev'd in part by Batas v. The Prudential Ins. Co. of Am.*, 281 A.D.2d 260 (N.Y. App. Div. 2001), *motion granted by Batas v. The Prudential Ins. Co. of Am.*, 721 N.Y.S.2d 856 (N.Y. App. Div. 2001) [hereinafter Affidavit of Patrick F. Vetere].

120. Affidavit of Patrick F. Vetere, *supra* note 119, at 4-5.

121. *Id.* at Exhibit 4 (dated June 28, 1996).

122. Affidavit of Patrick F. Vetere, *supra* note 119, at 8.

someone who is not even a physician, let alone one who is trained and experienced in the medical condition at issue Moreover, . . . Prudential did not even consult with a trained gynecologist with experience in these types of operations prior to deciding that further hospitalization was not medically necessary.¹²³

Musette Batas, another example among Dr. Vetere's patients for improper Prudential "interference with the practice of medicine" and whose "health was threatened as a result of Prudential's improper conduct,"¹²⁴ suffered from Crohn's disease, a painful, potentially life-threatening bowel disease. When six months pregnant, her baby at risk as well, she was hospitalized for severe pain, but in spite of persistent severe pain, had to be discharged after two days because Prudential refused additional coverage. Barely one week later, she was readmitted through the emergency room. One of Dr. Vetere's colleagues immediately applied for permission to perform an exploratory laparotomy. Two days and several phone calls later, the hospital having been told that the request was "pending" and "waiting for Prudential's bureaucratic machinery to move," the patient's intestine burst, requiring immediate emergency surgery. Because of the considerable risk of infection, her life was at stake. In addition, the attending surgeon did not expect the baby to survive, and if it would, felt that brain damage might occur.¹²⁵ Four days after the initial request for exploratory surgery authorization and two days after the emergency procedure, Prudential approved the exploratory surgery. Four days after the emergency surgery, the Concurrent Review Nurse called the attending surgeon's office to "demand" the patient's discharge. Only after the physician "expressed outrage at this decision, explaining to Ms. . . .

123. *Id.* at 7, 8. In addition, Dr. Vetere received a letter from Prudential, indicating that a company physician wanted to discuss his apparent dissatisfaction with his "contracted status as a participating physician in the Prudential network", and the desire to speak with the head of Dr. Vetere's department at S.U.N.Y. to confirm whether Dr. Vetere was speaking on behalf of the department when complaining to the Prudential Executive Director about the handling of Ms. Vogel's case. *Id.* at Exhibit 2 (dated May 31, 1996). "I took this request as a veiled threat that she could retaliate against me for objecting to Prudential's mistreatment of my patient." *Id.* at 6.

124. *Id.* at 8.

125. Affidavit of Musette Batas in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss, at 6, 10 (Aug. 4, 1997), in *Batas v. The Prudential Ins. Co. of Am.*, (N.Y. App. Div., Dept. 1, Index No. 97-107881, IAS Part 49) (filed 1997), *aff'd in part, rev'd in part by Batas v. The Prudential Ins. Co. of Am.*, 281 A.D.2d 260 (N.Y. App. Div. 2001), *motion granted by Batas v. The Prudential Ins. Co. of Am.*, 721 N.Y.S.2d 856 (N.Y. App. Div. 2001) [hereinafter Affidavit of Musette Batas].

[the Concurrent Review Nurse] that I was barely out of surgery, was pregnant and was seriously ill, Prudential backed down."¹²⁶

One week later, the same nurse decided, based on a review of the medical chart and "internal guidelines" never disclosed to the patient, that she had to leave the hospital. The patient acquiesced, fearing the financial burden of out-of-pocket payments for continued hospitalization. In his affidavit, Dr. Vetere disputed Prudential's

right to make such critical medical determinations based on third party guidelines that are not even interpreted by properly trained physicians . . . [h]ad I acted with regard to my patient as it [Prudential] had, I would have committed an act of malpractice. In my opinion, Prudential has done just that.¹²⁷

Dr. Vetere's office manager eventually reported to Prucare the physicians' dissatisfaction with the way the company's medical management division had handled five patients, both plaintiffs included. "We have been told on more than one occasion that 'it doesn't matter how the patient feels or what the doctor feels is medically necessary, it is what Prucare feels is medically necessary.'"¹²⁸

*Johnson v. Humana*¹²⁹ also concerned a hysterectomy. Karen Johnson was diagnosed with cervical cancer *in situ* with endocervical gland extension. Even though her attending physicians considered a hysterectomy medically necessary, Humana only approved a cervical conization. Ms. Johnson paid for the recommended procedure out-of-pocket.¹³⁰ Prior to the denial, she was called by Humana nurses who, in a recorded conversation, asked questions prompted by the VHS software to derive a "profile" which was faxed to VHS reviewers in California, all of them non-practicing physicians. The reviewers generally made treatment decisions without evaluating patients' medical records, followed instructions not to speak with them, and denied or approved claims after a—taped—interview with the treating physician, and a brief review of the

126. Affidavit of Musette Batas, *supra* note 125, at 7.

127. Affidavit of Patrick F. Vetere, *supra* note 119, at 10.

128. *Id.* at Exhibit 5 (dated April 18, 1996).

129. *Johnson v. Humana Health Plan*, (Jefferson Circuit Ct., Ky.) (Case No. 96-CI-00462 (Jan. 23, 1997) (unreported)).

130. For the approved conization, an out-patient procedure, Humana would have had to spend \$787, a discounted \$7,000 for the in-patient hysterectomy. Ms. Johnson, who did not receive a discount, was charged more than \$14,000. Brief for Appellee Johnson, at 4, in *Humana Health Plan v. Johnson* (Ky. Ct. App.) (Case No. 99-CA-166) (unreported) [hereinafter Brief for Appellee Johnson].

“profile.” Also, Humana instructed Ms. Johnson not to obtain a second opinion even though more than ninety gynecologists would have been available for second opinions, based on an actual examination of the patient and of her record for less than what Humana paid VHS.¹³¹ Humana thus relied on the VHS denial even though the VHS contract advised that the medical review system is “not intended as a replacement for the exercise of medical judgment by the treating health care professional.” VHS furthermore pointed out that “there is no assurance that every variable that may bear on appropriateness or effectiveness is known or has been considered by VHS, that the course of treatment is ideal or appropriate for any particular covered person, or that any treatment will be successful.”¹³²

The Brief for Appellee stated that Humana had identified hysterectomies as “high-cost” and contracted with Value Health Services (VHS) to review treatment requests for such procedures.¹³³ The denial rate was a consistent 25%, compared with a national average of 1.2% for patients with Ms. Johnson’s condition. One of the VHS physician reviewers admitted that, based on the VHS computer program and company policy, no patient with Ms. Johnson’s condition would be approved for a hysterectomy without having undergone a conization first.¹³⁴ National Cancer Institute guidelines, however, consider a hysterectomy the appropriate treatment for patients with the plaintiff’s condition. Furthermore, an expert testified at trial that a hysterectomy was the standard of care and the cure for Ms. Johnson’s stage zero carcinoma, compared with a recurrence rate of over 30% for conization.¹³⁵

In addition, none of the VHS reviewers were aware of Humana’s medical necessity definition, and, as a consequence, “used their own definitions of the standard of care rather than what language was contained

131. *Id.* at 3, n.5, 11.

132. *Id.* Leslie D. Michelson, however, then Chairman and CEO of VHS and one of its founders, underlined the following virtues of the Medical Review System: “It uses very specific, very scientific criteria that would distinguish between candidates who would benefit from a medical procedure, and those who would be adversely affected by it.” Ronald Shinkman, *Enterprise: Computers Get Into Disease Management*, 17 L.A. BUS. J. 1, No. 34, Aug. 21, 1995. In 1996, Mr. Michelson added, “A system such as the MRS is valuable because the medical community doesn’t always have enough current information to know precisely what interventions are optimal for which patients and when. Healthcare technology is evolving with unprecedented speed. The MRS helps physicians stay on top of all of those developments.” PR Newswire, *One Millionth Case Goes Through Value Health Sciences’ Medical Review System*, FIN. NEWS (May 20, 1996).

133. Brief for Appellee Johnson, *supra* note 130, at 3.

134. *Id.* at 5. This means in practice that a patient must have a recurrence of her cancer before a hysterectomy will be approved.

135. *Id.* at 6, 8.

in her [Ms. Johnson's] own contract with Humana."¹³⁶ Dr. Lankford, Humana Senior Vice President for Medical Affairs at the time, testified:¹³⁷

Q. Does it disturb you at all if I told you that the doctors at VHS did not understand the definition of medical necessity in Karen Johnson's contract of insurance?

No, we didn't ask vendors to understand our contracts. That was part of keeping the administrative process back here, both the overview of the material and any negative decision making had to be here because that all had to be done internally. We just asked the outside vendors for *clinical expertise* – (emphasis added)

So it did not matter to you whether they were applying a different definition of medical necessity than was in her contract?

No. I don't care what they thought about that issue. My physician director would have clarified it and made the right final decision, that's what their job was here.

Would it matter to you at all if Doctor Maroc testified that in this case that he does not – he did not know at the time he reviewed Karen Johnson's case what the definition of medical necessity was in her contract?

A. Each of—the management process was to look at the contracts before denying it. So if there was anything unusual from what he had been taught, it would have been flagged to him. Whether or not he reviewed the actual document is—is not the issue. There was a process for him to do it. I didn't have the physicians look at individual contracts, the staff did that in the department.

Dr. Maroc, the Humana physician responsible for the final treatment "review" decision who relied on the VHS denial, defined medical necessity during deposition as "a situation where care needs to be provided to

136. *Id.* at 3.

137. Deposition of Ronald D. Lankford at 156, 157 (Dec. 15, 1997), in *Johnson v. Humana Health Plan*, (Jefferson Circuit Ct., Ky.) (Case No. 96-CI-00462 (Jan. 23, 1997) (unreported) [hereinafter Deposition of Ronald D. Lankford]).

prevent loss of life or limb or to prevent excessive morbidity from occurring.”¹³⁸ He admitted that he was unaware of the definition laid down in the patient’s insurance policy (“I didn’t pay any attention to the insurance agreement”¹³⁹):

To be medically necessary a service or supply must be:

A. consistent with the symptoms or diagnosis and treatment of the member’s sickness and injury; and

B. appropriate with regards to the standards of good medical practice.

Dr. Lankford later testified:

A. . . . Medical necessity as he [Dr. Maroc] mentioned is an issue to do with the cost of doing the therapies. So there is always a certain rate of mortality and morbidity associated with treatments and that has to be balanced in some fashion with the outcomes. . . . And then as we formalize things in the practice guidelines, or in this case using the VHS system which was a formalized practice guideline system, you rely on that system to consistently make that decision.

Q. Does Dr. Maroc’s definition of medical necessity have anything to do with whether or not the procedure is consistent with good medical practice?

A. Dr. Maroc’s decision was not critical in this case. The clinical decisionmaking was by a screening process in the VHS system, followed by the clinical review by the physicians that were board-certified and . . . were familiar with the VHS system. Dr. Maroc’s part of the job was to ensure that the processes in that department were going well relative to how the reviews were done He was not making clinical decisionmaking.¹⁴⁰

138. *Id.*

139. Deposition of James A. Maroc, at 101 (Jan. 23, 1997), in *Johnson v. Humana Health Plan*, (Jefferson Circuit Ct., Ky.) (Case No. 96-CI-00462 (Jan. 23, 1997) (unreported).

140. Deposition of Ronald D. Lankford, *supra* note 137, at 159-60.

None of the Humana physicians participating in the decision making process were gynecologists, nor were they in practice.¹⁴¹ They received a salary of \$100,00 plus \$5,000 bonuses for limiting hospital admissions and lowering the numbers of hospital days of Humana patients. For denying Ms. Johnson's four-day hospitalization for a hysterectomy, Dr. Maroc was compensated with two such bonus payments.¹⁴² The Circuit Court jury found the Humana denial of the hysterectomy to be an act of bad faith, and awarded the plaintiff \$14,000, the cost of the procedure, \$100,000 for mental suffering, and \$13 million in punitive damages. The case reportedly was settled for more than \$2 million.¹⁴³

For the first time, a lawsuit has now been filed directly against one of the vendors of commercial guidelines, the actuarial firm Milliman & Robertson. The plaintiffs in *Cleary, Riley v. Milliman & Robertson*,¹⁴⁴ two pediatricians, are suing the company for defamation, appropriation of name, tortious interference with contract of employment, civil conspiracy, and fraud and deceit. According to the complaint, M&R listed both Drs. Cleary and Riley¹⁴⁵ without their consent as contributing authors of the pediatric guidelines, published in 1998.¹⁴⁶ In their affidavits, both physicians stated that at no time were they made aware of nor did they give their approval for the use of their names and professional reputations (the volume lists both plaintiffs as the only experts in their respective fields) in support of the M& R pediatric guidelines.¹⁴⁷ On November 13, 1999, a

141. When Humana hired Dr. Maroc, the corporation was aware that his license was on probation in Iowa, and that he was not licensed to practice medicine in Kentucky. Nineteen months later, at the time of the court proceedings, his status had not changed. *Johnson v. Humana Health Plan*, (Jefferson Circuit Ct., Ky.) (Case No. 96-CI-00462 (Jan. 23, 1997) (unreported)).

142. *Id.*

143. 4(18) Mealy's Managed Care Liability Report 15 Sept. 29, 2000.

144. Plaintiff's First Amended Petition, in *Cleary v. Milliman & Robertson*, (Dist. Ct., Harris County, Tex.) (Case No. 99-56719) (unreported, decided 2000) [hereinafter Plaintiff's First Amended Petition].

145. Thomas G. Cleary, M.D., is Board Certified in Pediatrics and Pediatric Infectious Diseases with the American Academy of Pediatrics. He is tenured Professor of Pediatrics, Division of Infectious Diseases, at the University of Texas Medical School, Houston. William J. Riley, M.D., is Board Certified in Pediatrics and Pediatric Endocrinology with the American Academy of Pediatrics. He was tenured Professor of Pediatrics at the University of Texas - Medical School, and currently serves as Vice President of Medical Education at Driscoll Children's Hospital in Corpus Christi, Texas.

146. Schibanoff, *supra* note 58.

147. Affidavit of Thomas C. Cleary (Nov. 11, 2000) in *Cleary v. Milliman & Robertson*, (Dist. Ct., Harris County, Tex.) (Case No. 99-56719) (unreported, decided 2000) [hereinafter Affidavit of Thomas C. Cleary]; Affidavit of William J. Riley (Nov. 10, 2000) in *Cleary v.*

temporary injunction ordered M&R to cease publication of the *Health Care Status Improvement & Management (HSIM)* showing both plaintiffs as contributing authors. The amended complaint¹⁴⁸ asks for exemplary damages under the Texas Civil Practice & Remedies Code, for punitive damages, and a full injunction against M&R to cease use and publication of plaintiffs' names as well as a recall from the stream of commerce all *Pediatric HSIM* volumes listing them as contributing authors.

Both plaintiffs have denounced the guidelines as seriously flawed and dangerous to pediatric patients. Dr. Cleary, after examining the proposed guidelines pertaining to infectious diseases sent to him by Dr. Yetman, one of the defendants, had provided the feedback that "the proposed guidelines were dangerous and would harm kids. I recall that my words to him were that 'children may die because of these guidelines.'"¹⁴⁹ He added in his affidavit,

The published *Pediatric HSIM* are seriously flawed in their approach to in-patient pediatric care. In my professional opinion, the guidelines, overall, have a tendency to mislead the user by understating the actual length of stays that are required and are appropriate for seriously ill children. In regard to my particular area of medical specialty, there are in-patient guidelines and goal lengths of stay for multiple serious pediatric infectious diseases that are severely out-of-line with the standard of pediatric care. As written, these guidelines pose significant risks of harm, death and/or serious injury to children. Dangerous guidelines include those for: endocarditis, brain abscess, septic arthritis, osteomyelitis, neonatal sepsis, neonatal meningitis, and meningitis in the older child.¹⁵⁰

For some illnesses, Dr. Cleary would recommend six weeks of hospitalization while the guidelines suggest three days.¹⁵¹ The pediatrician

Milliman & Robertson, (Dist. Ct., Harris County, Tex.) (Case No. 99-56719) (unreported, decided 2000) [hereinafter Affidavit of William J. Riley].

148. Plaintiff's First Amended Petition, *supra* note 144.

149. Affidavit of Thomas C. Cleary, *supra* note 147, at 2; Plaintiff's First Amended Petition, *supra* note 144.

150. Affidavit of Thomas C. Cleary, *supra* note 147, at 2.

151. Mary Flood, *Doctors Say Book Misused Their Names*, THE WALL STREET J., Nov. 17, 1999, at T1.

also found "at least one risky recommendation on each page of the 400-page document."¹⁵²

Dr. Riley, who had been asked to write and review two pediatric endocrinology sections, assumed that the project had been abandoned since he received no response to his first draft. In his affidavit, Dr. Riley "vehemently" disagreed with and disavowed in particular the guideline concerning the in-patient care of diabetic ketoacidosis:

This section, as published, poses a significant risk of harm to pediatric patients who might suffer from diabetic ketoacidosis. In fact, the *Guidelines* suggest that for admission to ICU for coma from this condition that the goal length of stay is (1) day. This is so clearly outside of any reasonable approach to the standard of care as to be wholly reckless, without regard to the safety of any child with severe DKA. I am professionally and personally shocked and distraught that my name would be listed as the only endocrine pediatric specialist on a volume that contains such an outrageously irresponsible and dangerous recommendation.¹⁵³

Both physicians expressed mental anguish, embarrassment and humiliation arising from the association of their names and reputations with guidelines posing potential harm to children.

An additional possibly revealing aspect of the legal action is the question whether M&R "tried to buy scientific legitimacy by giving \$100,000 to the pediatrics department at University of Texas Houston in exchange for the schools stamp of approval."¹⁵⁴ The department is listed as the co-presenter of the *Pediatric HSIM* in the first sentence of the preface¹⁵⁵ but what precise role it actually played in the issuance of the guidelines and whether some of the faculty were manipulated into becoming contributing authors remains to be seen. Dr. Cleary suspected that M&R might have wanted the cachet of medical school research to stave off "a firestorm of anger" at the proposition that pediatric care might be withheld for cost-

152. Ron Nissimov, *Cost-Cutting Guide Used by HMOs Called "Dangerous,"* HOUSTON CHRON., March 5, 2000, at A1 [hereinafter *Cost-Cutting Guide Used by HMOs Called "Dangerous"*].

153. Affidavit of William J. Riley, *supra* note 147, at 2.

154. *Cost-Cutting Guide Used by HMOs Called "Dangerous," supra* note 152.

155. Ron Nissimov, *Judge Tells Firm to Explain How Pediatric Rules Derived*, HOUS. CHRON., Nov. 3, 2000, at A35 [hereinafter *Judge Tells Firm to Explain How Pediatric Rules Derived*]. Upon request by the UT-Houston Medical School, M&R has refrained from naming it in subsequent *HSIM* editions.

containment purposes.¹⁵⁶ Even though the *Pediatric HSIM* is intended to “communicate best practices in pediatrics, ... developed in accordance with the principles of evidence-based medicine, employing the current best evidence”¹⁵⁷, the methodology by which the guidelines were derived remains unknown and, according to the Texas Pediatric Society, fails to meet the standards set by the American Academy of Pediatrics and the Agency for Health Care Policy.¹⁵⁸ Dr. Cleary has denied the existence of data or clinical studies showing the safety of the recommendations which were “pulled out of thin air.”¹⁵⁹ The Texas Pediatric Society expressed hope that potential methodological flaws of guideline development would be revealed in the course of discovery to public and professional scrutiny.¹⁶⁰

In response to plaintiffs’ request for production of documents, M&R considered the following material “confidential, proprietary and trade secret information”: correspondence with any pediatric association; corrections, recommendations, and/or suggested changes made by any pediatric association; and agreements and contracts with such associations.¹⁶¹ On the same grounds, the company objected to the production of information relating to the medical cost savings to be attained by customers or users of M&R’s new generation of *HSIM*, including the *Pediatric HSIM*. It further rejected as “overbroad, unduly burdensome, and not likely to lead to the discovery of admissible evidence” requests for the production of copies of “any and all epidemiology studies, analysis, or statistical analysis or study done that supports, references, discusses or refers to any factual, medical and/or scientific explanation underlying M&R’s representation that its *Pediatric HSIM* December 1998 volume comprises ‘evidence-based medicine.’” M&R pointed to the references “made to hundreds of published studies and analyses in various areas of pediatrics.”¹⁶² The same objection and references to cited publications were made to requests for copies of epidemiological studies, statistical analysis, studies or other analytical,

156. *Cost-Cutting Guide Used by HMOs Called “Dangerous,” supra* note 152.

157. Schibanoff, *supra* note 58.

158. Texas Pediatric Society, Memo from the Texas Chapter of the American Academy of Pediatrics (AAP), to Joe Sanders, M.D., Executive Director, AAP (June 14, 2000).

159. *Cost-Cutting Guide Used by HMOs Called “Dangerous,” supra* note 152.

160. Texas Pediatric Society, *supra* note 158.

161. Defendant Milliman & Robertson, Inc.’s Response to Plaintiff’s First Request for Production at 3, (Feb. 2, 2000), in *Cleary v. Milliman & Robertson*, (Dist. Ct., Harris County, Tex.) (Case No. 99-56719) (unreported, decided 2000) [hereinafter *Milliman & Robertson’s Response to Plaintiff’s First Request for Production*].

162. Defendant Milliman & Robertson, Inc.’s Response to Plaintiff’s Second Request for Production, (Feb. 2, 2000) Plaintiff’s First Amended Petition, *supra* note 144.

scientific and/or statistical work to support or arrive at the *HSIM*'s goal length of stay (GLOS) recommendations, and for studies in support of the representation that the guidelines concern the healthiest 85% of the pediatric population and not the remaining sickest 15%.¹⁶³

The Preface to the *Pediatric HSIM* correctly points out that published empirical studies are not available to validate all medical procedures. Meta-analyses, however, detect trends represented by a large number of studies employing somewhat different methodologies but dedicated to the same subject matter. At least some of the "hundreds of studies and analyses" cited by M&R could have been examined by meta-analysis for guideline development and validation. For the GLOS, much less complex statistical tests could have yielded results revealing prevailing practices.¹⁶⁴ Furthermore, a model could be developed to adjust for "inefficiencies" in the delivery of health care to arrive at the "best practices" ("not the median, not the average"¹⁶⁵), which M&R claims to represent. Since this would equal original research and could stimulate additional research, there would be no reason to conceal it from the public and the scientific community.

On November 1, 2000, the district judge presiding over the *Cleary v. Milliman & Robertson* proceedings, ordered the company to respond to questions concerning the methodology for the development of certain pediatric care recommendations. Company officials had refused to reveal this information during depositions upon the advice of counsel. The judge did not preclude the possibility that questions relating to the origin of other M&R guidelines might be appropriate in the future.¹⁶⁶

Information concerning M&R guideline development would then support or invalidate the company's claim of scientific validity. Several recent publications shed some light on their clinical usefulness. The

163. Milliman & Robertson's Response to Plaintiff's First Request for Production, *supra* note 161.

164. *Cost-Cutting Guide Used by HMOs Called "Dangerous," supra* note 152. (showing a simple calculation by the American College of Surgeons (ACS) of actual average stays for five surgical procedures as suggested by 1,000 of its members, compared with the actual average stays throughout North Carolina (N.C.) in 1996, and the M&R recommendations, yielded the following results: mastectomy: ACS 2.5, N.C. 2.7, M&R 0; appendectomy: 5, 3.5, 1; radical hysterectomy: 9, 5.9, 2; coronary artery bypass: 5, 8.3, 3; esophagectomy: 13, 12.9, 5, *ANNALS OF SURGERY*, vol.228 No.4, Oct. 1998).

165. Jim Schibanoff, *Presentation on Development and Implementation of Managed Care Guidelines* at 9, University of Texas, Houston Medical School (May 13, 1997) (transcript available at Houston Medical School, Department of Pediatrics).

166. *Judge Tells Firm to Explain How Pediatric Rules Derived, supra* note 155.

private HCIA-Sachs Institute¹⁶⁷ released the results of two studies, comparing the M&R pediatric length of stay (LOS) guidelines with 1998 data for 3.5 million pediatric discharges at 2,400 general, non-federal hospitals for forty-five pediatric conditions; and the LOS for the same pediatric conditions at the Institute's *100 Top Hospitals*.¹⁶⁸ While M&R considers 85% of all cases as "uncomplicated," the HCIA-Sachs studies adjusted for four severity levels using the All Patient Refined Diagnosis Related Groups (APR-DRGs).¹⁶⁹ Contrary to the M&R guidelines, this system of classification accommodates the severity of the underlying illness, of the comorbidity and complicating conditions. Across syndromes, 74% of cases were found to correspond to the baseline severity level. Among conditions, however, the percentage of low-severity patients ranged from 18% (drug withdrawal syndrome) to 99% (slipped femoral epiphysis).¹⁷⁰ 75% of all complicated and 64% of all uncomplicated cases had LOS exceeding the M&R GLOS. For uncomplicated cases, the LOS varied by condition, exceeding the M&R GLOS by 9% for epiglottitis to 88% for bacterial meningitis. For twenty-seven of forty-five pediatric conditions examined, more than 50% of the LOS for uncomplicated cases exceeded the M&R GLOS. For diabetic ketoacidosis (n=4,955), the HCIA-Sachs Institute found an average LOS of 2.9 (median 2, mode 2) while M&R recommends one day. All LOS at the hospitals included in the study exceeded the M&R GLOS (complicated cases 92%, uncomplicated 80%, all 81%), thus supporting Dr. Riley who had called the one-day hospital stay for DKA "wholly reckless, without regard to the safety of any child." The authors of the study concluded that

the consequences of encouraging clinicians to reduce LOS to the Milliman & Robertson GLOS are of particular concern. . . . In all conditions, clinicians need the latitude to extend the LOS for patients with certain comorbid or

167. HCIA-SACHS INSTITUTE, COMPARISON OF MILLIMAN AND ROBERTSON PEDIATRIC LENGTH OF STAY GUIDELINES (2000) (consulting firm in Evanston, IL, rates hospitals to produce a list of the 100 Top Hospitals in the country, based on efficiency and quality of care. Through its Clinical Research Program, the Institute conducts clinical studies to improve the quality and delivery of care).

168. *Id.* (stating top hospitals are considered the most efficient and well managed facilities in the country).

169. HCIA-SACHS INSTITUTE, *supra* note 167, at 4 (citing RICHARD F. AVERILL, 3M HEALTH INFORMATION SYSTEMS, ALL PATIENT REFINED DIAGNOSIS RELATED GROUPS DEFINITIONS MANUAL, VERSION 15.0. (1998)).

170. *Id.* at 5 (stating less than half of all cases fell in the baseline severity level for the following conditions: drug withdrawal syndrome, endocarditis, bacterial meningitis, burn (major), neonatal sepsis, gastrointestinal bleed, sepsis (strep pneumonia)).

complicated conditions that require further care. Because M&R assumes that sophisticated home health care is available, it is also important that clinicians be able to provide inpatient care when such services are unavailable.¹⁷¹

As Dr. Cleary observed, "These guidelines are merely a mechanism for insurance companies to avoid their responsibilities and to shift the cost of care from themselves to kids' families. The guidelines quite literally appear to have been made up."¹⁷²

Results of the *100 Top Hospital* study showed that lengths of stay for 60% of uncomplicated cases exceeded the M&R GLOS. For twenty-three of the thirty-six conditions in this study, more than 50% of the uncomplicated cases had LOS exceeding M&R recommendations. Interestingly, the top hospitals applied LOS shorter or equivalent to non-winner hospitals for almost all of the conditions included in the study.¹⁷³ A M&R spokesman questioned the studies' credibility by emphasizing that they were conducted by a competing consulting medical firm.¹⁷⁴ But another recent investigation found that the LOS in New York State in 1995 for sixteen pediatric conditions also exceeded those of M&R. (No adjustments, however, were made for severity of condition.) The authors warn of the "potential effects of such guidelines on both patients and the hospitals caring for them. While endorsing the need for cost-effective practice, we call attention to the methods used to develop and validate guidelines."¹⁷⁵

D. Conclusion

Courts have increasingly recognized that managed care companies make medical decisions.¹⁷⁶ By subjecting the attending physicians'

171. *Id.* at 7.

172. Linda O. Prager, *Pediatric Hospital Stay Goals Questioned*, AM. MED. NEWS, Oct. 9, 2000, at http://www.ama-assn.org/sci-pubs/amnews/pick_00/prl21016.htm.

173. HCIA-SACHS INSTITUTE, *100 TOP HOSPITALS PEDIATRIC LOS COMPARISON WITH NON-WINNERS AND MILLIMAN & ROBERTSON GUIDELINES* 7, 8 (2000).

174. Ron Nissimov, *Studies: Children Shortchanged by Hospital Guidelines*, HOUS. CHRON., Sept. 15, 2000.

175. MARION S. SILLS ET AL., *Pediatric Milliman and Robertson Length-of-Stay Criteria: Are They Realistic?* 105(4) PEDIATRICS 733 (Apr. 2000).

176. *Snow v. Burden*, M.D., 1999 U.S. Dist. LEXIS 6932 (E.D. Pa. May 1999) (delaying authorization by MCO for diagnostic procedures was substandard medical care); *Plocica v. Nylcare of Texas, Inc.*, 43 F. Supp. 2d 658 (N.D. Tex. 1999); *Moscovitch v. Danbury Hosp.*, 25 F. Supp. 2d 74 (U.S. Dist. Conn. Oct. 1998) (in both cases, the appropriateness of the medical and psychiatric care decisions of the MCOs were successfully challenged); *Blaine v. Community*

treatment recommendations to medical necessity determinations according to corporate criteria, often based on commercial guidelines deviating from the prevailing standard of care, MCOs substitute their medical judgment for that of the attending physicians. Frequently, such medical necessity evaluations, judging the appropriateness of the treating physician's diagnosis and proposed treatment plan, are made by individuals without the required experience, medical training and knowledge of patient's individual circumstances.¹⁷⁷ This practice has been rejected by the American Medical Association, which insists that clinical judgment be left to properly qualified licensed physicians with adequate patient contact, and be in agreement with the applicable standard of care and the prevailing medical opinion.¹⁷⁸ The organization further considered utilization review programs that "involve the gathering of symptoms from a patient and communication of a diagnosis to the patient" (such as on-site concurrent review by nurses) as having many of the characteristics of the practice of medicine. Physicians themselves have protested the "undue interference in their practice of medicine" by MCO medical management staff without proper

Health Plan, 687 N.Y.S.2d 854 (N.Y. 1998) (stating that decision by MCO to have patient seen by a nurse instead of a physician for diagnosis and treatment represented a unilateral determination of medical treatment); *Nascimento v. Harvard Community Health Care Plan, Inc. et al.*, 1997 Mass. Super. LEXIS 166 (Mass. 1997) (stating MCO denial of autologous bone marrow transplant in spite of contractual promise to provide all medically necessary care was medical malpractice); *Roessert v. Health Net et al.*, 929 F. Supp. 343 (N.D. Cal. 1996) (stating the MCO's decision to commit plaintiff to a mental institution was a medical decision).

177. Affidavit of Patrick F. Vetere, *supra* note 119, at 3. See also *Batas v. The Prudential Ins. Co. of Am.*, (N.Y. App. Div., Dept. 1, Index No. 97-107881, IAS Part 49) (filed 1997), *aff'd in part, rev'd in part by Batas v. The Prudential Ins. Co. of Am.*, 281 A.D.2d 260 (N.Y. App. Div. 2001), *motion granted by Batas v. The Prudential Ins. Co. of Am.*, 721 N.Y.S.2d 856 (N.Y. App. Div. 2001) (attending physician, Dr. Vetere, for plaintiffs Batas and Vogel, stated in his affidavit that a Prudential Concurrent Review Nurse called his office two days after Ms. Vogel's surgery and "informed us that there was *no medical reason* (emphasis added) to keep the patient hospitalized, stating that Prudential would not cover any further expenses arising from the patient's hospitalization." The physician instructed his staff to inform the nurse that he "adamantly disagreed with her medical opinion" and would refuse to discharge Ms. Vogel.

In her trial testimony, Dr. Linda Peeno explained that a Humana case manager nurse has the authority to tell a board certified pediatric neurologist what to do. "That's exactly what a health plan does . . . and that is part of the difference between managed care and traditional insurance that now the plan holds itself out as doing that, and that's one of the requirements that they have to meet in order to be accredited." Record at 1902, 1903, in *Chippis v. Humana Health Ins. Co. of Fla.*, (15th Jud. Cir., Palm Beach County, Fla.) (Case No. CL 96-00423 AE) (unreported, filed 1996). See also *supra* note 69.

178. Amicus Curiae Brief of the American Medical Association and The Medical Society of the State of New York at 2 (March 30, 2000), *Batas v. The Prudential Ins. Co. of Am.*, (N.Y. App. Div., Dept. 1, Index No. 97-107881, IAS Part 49) (filed 1997), *aff'd in part, rev'd in part by Batas v. The Prudential Ins. Co. of Am.*, 281 A.D.2d 260 (N.Y. App. Div. 2001), *motion granted by Batas v. The Prudential Ins. Co. of Am.*, 721 N.Y.S.2d 856 (N.Y. App. Div. 2001) [hereinafter Amicus Curiae Brief of the American Medical Association].

qualifications or by medical management department physicians not specialized in their respective areas.¹⁷⁹ Furthermore, long delays in obtaining approval for medical procedures are common. In cases of denial, the appeals process for what is considered essential treatment can be even more time-consuming. As a consequence, patients' conditions have deteriorated irreversibly and some have died.¹⁸⁰ Even though delays and denials are generally classified as "administrative" in nature, they often have medical consequences and thus represent de facto medical decisions not to treat.

1. Guidelines

Cost containment in health care and the standardization of medical practice for quality control are generally not disputed in today's health care delivery environment. Because of the extensive use of guidelines for such purposes, guideline validity is essential. Guidelines developed by medical specialty societies according to scientific and evidence-based criteria, reflective of prevailing practices, and in agreement with Institute of Medicine and Agency for Healthcare Research and Quality standards, would most likely meet with little resistance on the part of practitioners. Commercial guidelines, however, derived from data considered "proprietary" and judged by physicians as endangering patients and in violation of the standard of care, are rejected as "straightjackets" and "cookbook medicine." Furthermore, the perceived economic motives for such guideline development and their indiscriminate use by MCOs undermine the guidelines' credibility with the medical community.¹⁸¹

Physicians have also expressed concern about practice guidelines stretching the definition of primary care beyond what practitioners should responsibly perform in their offices. According to the M&R guidelines, large, potentially malignant facial lesions can be removed by general practitioners,¹⁸² avoiding a referral to a plastic surgeon. Furthermore, as reported by the director of an emergency room, MCOs have recently

179. MARK GREEN, WHAT AILS HMOS—A CONSUMER DIAGNOSIS AND R_x, 63 (1996) (a report by the Public Advocate for the City of New York).

180. *Crum v. Health Alliance Mid-West, Inc.* 47 F. Supp. 2d 1013 (C.D. Ill. 1999) (stating that triage hotline nurse denied patient's admission to emergency care resulting in cardiac arrest); *Pappas v. Asbel*, 724 A.2d 889 (Pa. 1998), *reh'g denied* (Feb. 12, 1999) (stating that patient became paraplegic because of delayed admission to the appropriate neurological facility).

181. Myerson, *supra* note 44, at C1 (stating that Dr. Doyle, chief author of the M&R guidelines, has stressed that the guidelines are goals not rules but that "the more rigorous the application, the greater the savings").

182. MARK GREEN, *supra* note 179, at 64 (quoting *Pushing the Definition of Primary Care to the Limit*, MED. ECONOMICS, Aug. 7, 1995, at 60).

instructed patients to see their primary care provider instead of visiting an ER. "I find this worrisome, many PCPs have little suturing experience and wouldn't know one tendon from another."¹⁸³ The M&R hospitalization length-of-stay guidelines were called unrealistically optimistic by the AMA because treatment and recovery often do involve considerable complications since patients do not respond optimally, as the guidelines assume.¹⁸⁴ Even though M&R points out that physicians should use their own judgment, doctors are "worn down by constant bickering with insurance companies that use guidelines such as M&R. A clerk with no knowledge of medicine is often the one telling the doctor what the recommended treatment is, and doctors have no idea the guidelines were written by an actuarial firm."¹⁸⁵

2. Cost Containment

MCOs, physicians' offices and hospitals require an elaborate administrative infrastructure for the preauthorization and concurrent review of individual medical decisions. Disputes with providers over delays and denials, frequent arguments over payment for tests or necessary equipment, and excessive paperwork¹⁸⁶ absorb additional resources. Hospitals may dedicate entire office suites to on-site personnel conducting concurrent review for numerous MCOs. Managed care companies may have eighteen nurses on staff for treatment reviews, a full-time medical director, twenty-seven customer service representatives, and four part-time medical directors. On the business side, there may be eight representatives to recruit providers, fifteen salespeople to sell to employers, and roughly one-hundred clerical workers for claims processing.¹⁸⁷ In addition, major data processing centers are required for the wealth of medical and business information generated by a large MCO. Humana, for example, has four-hundred in-house application programmers for the development and maintenance of its own application systems. "The information systems support marketing, sales, underwriting, contract administration, billing, financial . . . customer service, authorization and referral management,

183. *Id.*

184. Amicus Curiae Brief of the American Medical Association, *supra* note 178, at 9.

185. *Cost-Cutting Guide Used by HMOs Called "Dangerous," supra* note 152.

186. MARK GREEN, *supra* note 179, at 63.

187. *Id.* at 81 (stating that this was the infrastructure of an HMO with 110,000 members in New Jersey).

concurrent review, physician capitation and claims administration, provider management, quality management and utilization review.”¹⁸⁸

Whether the immense administrative apparatus for controlling and “standardizing” the micro-allocation of health care funds through managed care treatment decisions at the bedside absorbs whatever “efficiencies” may have been achieved, often at the patients’ expense, remains unanswered.¹⁸⁹ With health care expenditures stabilized on a macro level, the traditional providers’ hands-on clinical judgment might be just as “efficient” while much more patient-friendly.¹⁹⁰

188. Reply Memorandum of Law in Support of Plaintiff’s Motion for Class Certification. Attachment 1, Section 1, in *Price et al. v. Humana Inc.*, (S.D. Fla.) (Case No. 9:99-8763 CIV-Moreno) (unreported, filed 1999), *transferred and consolidated In re Humana Inc. Managed Care Litig.*, 2000 U.S. Dist. LEXIS 5099 (2000), *aff’d* 2002 U.S. App. LEXIS (11th Cir. 2002). (stating that Humana’s centralized management services include “management information systems, product administration, financing, personnel, development, accounting, legal advice, public relations, marketing, insurance, purchasing, risk management, actuarial, underwriting and claims processing”).

189. MCOs on the average spend close to 30% of every premium dollar on administration. Administrative expenditures by German sickness funds do not exceed 6% even though recent health care reforms are pushing costs upward.

190. *See, e.g.,* Dave Barry, *Wit’s End, Managed Care*, THE WASH. POST MAGAZINE, Oct. 15, 2000, at 36 (stating that the complex, bureaucratic administration of MCOs is certainly perceived by the public and solutions are proposed. “All we have to do is get in a time machine and go back to 1957. In those days we had a great health care system. The way it worked was, every family had a doctor, who wore a white coat and a head reflector, and who had an aquarium in his waiting room . . . In those days, medical paperwork was simple: The doctor gave you a bill. That was it. Whereas today, if you get involved with the medical care system in any way, including sending flowers to a hospital patient, you will spend the rest of your life wading through baffling statements from insurance companies. I speak with authority. At some point in the past, some member of my family apparently received medical care, and now every day, rain or shine, my employer’s insurance company sends me at least one letter, comically entitled “EXPLANATION OF BENEFITS,” which looks like it was created by the Internal Revenue Service From Hell. It’s covered with numbers indicating my in-network, out-of-pocket deductible; my out-of-network, nondeductible pocketable; my semi-pocketed, nonworkable, indestructible Donald Duckable, etc. For all I know, somewhere in all these numbers is a charge for Dr. Cohn’s fish food. What am I supposed to do with this information? . . . Let’s demand some action! Let’s track down the people sending out these EXPLANATION OF BENEFITS letters and have them arrested! Let’s bring back head reflectors!”); Carey Goldberg, *State Referendums Seeking to Overhaul Health Care System*, N.Y. TIMES, June 11, 2000, at A1 (stating that it may come as no surprise that states such as Maryland, Massachusetts, and Oregon are gearing up for referendums on the introduction of universal health care systems); Gina Kolata, *For Those Who Can Afford It, Old-Style Medicine Returns*, N.Y. TIMES, March 17, at A1 (stating that at the same time, increasing numbers of physicians accept self-paying patients only, adding another tier to the already multi-tiered American health care system).

III. GERMANY: ADMINISTRATIVE RULEMAKING

A. *Introduction to the German Statutory Health Care System*¹⁹¹

The German health care system is an all-payer, pre-paid, non-profit, universal access/universal coverage system of social health insurance which is currently embodied in Title Five of the Social Code (SGB V) of 1988.¹⁹² It originated at the beginning of the 19th century when tradesmen's guilds and industrialists began to introduce health care coverage for the protection of their members and workers. In 1883, under Chancellor Bismarck, the National Health Insurance Act was adopted which integrated all individual plans into a single national social insurance plan. The administrative structure which had grown out of seven categories of corporate sickness funds and sickness funds by profession was preserved and continues to be one of the foundations of the SGB V.¹⁹³ Within these categories, a total of over 500 plans offering by law almost identical comprehensive coverage is available. Originally, members were required to obtain coverage for life under their professional plans. In 1996, open enrollment was introduced as an element of competition among the different plans.

Premiums are assessed at a uniform percentage (13.8% in 2000)—premiums are split evenly between employers and members—up to a certain level of annual income (currently approximately \$40,000). This represents an element of income redistribution since half of the premium is spent on a member's health care, the remaining half on family members (covered at no additional charge, independent of their number) and on the elderly. The unemployed and the elderly continue to receive the same comprehensive benefits without paying premiums. Care is therefore provided according to need, not according to income. Those whose incomes exceed the legal maximum may opt out of the statutory plan. But

191. See Ursula Weide, *A Comparison of American and German Cost Containment in Health Care: Tort Liability of U.S. Managed Care Organizations vs. German Health Care Reform Legislation*, 13 TUL. EUR. & CIV. L. FOR. 47 (1998); Ursula Weide, *Health Care Reform and the Changing Standard of Care in the United States and Germany*, 20(3) N.Y. L. SCH. J. OF INT'L & COMP. L. 249 (2000).

192. SOZIALGESETZBUCH - FÜNFTES BUCH, SGB V. BGBl. S., 2477 Bonn. 20 Dezember 1988; [SOCIAL CODE, TITLE V, published in the GERMAN CODE 2477 (Dec. 20, 1988)] [hereinafter SGB V].

193. *Krankenkassen Betriebskassen* (individual corporate plans) *Innungskassen* (plans by trade). *Landwirtschaftliche Krankenkasse* (agricultural workers plan). *See-Krankenkasse* (merchant marine plan). *Bundesknappschaft* (mine workers plan). *Ortskassen* (local funds by municipality or county). Certain groups of blue and white collar workers also could choose one of the so-called substitute funds (*Ersatzkassen*) instead.

90% of all Germans remain covered as private coverage by law must correspond at a minimum to statutory coverage, creating little incentive to engage in private insurance contracting. Furthermore, most universal system members have private secondary insurance covering additional benefits such as private instead of semi-private hospital rooms. Ninety percent of all physicians are public plan providers but may also deliver care under private indemnity insurance.

While the government sets the overall legal framework for the health care system and its administration (the SGB V has been amended numerous times since its adoption in 1988 when it replaced the venerable Insurance Code of 1914,¹⁹⁴ also amended and fine-tuned over time), the delivery of care is subject to joint physician and sickness fund self-governance by associations. The principle of self-governance was officially announced by Bismarck in the "Imperial Message" on November 11, 1881, read during an opening session of the National Parliament, and announcing the introduction of the Social Insurances Act. The delegation of power to associations was intended to achieve "a greater closeness to the real forces of the citizens' lives by concentrating those forces within corporate entities protected and supported by the State, permitting the resolution of tasks which the State would be unable to accomplish to the same extent."¹⁹⁵ In 1972, the Constitutional Court of the Federal Republic rephrased in modern language the stated purpose of the delegation of rulemaking authority to associations, now corporate entities under public law. Subgroups of society should be allowed to regulate their own affairs based on their special expertise and knowledge of local particularities, often difficult to discern for the legislator, thus reducing the distance between those who adopt norms and those bound by them, and permitting more rapid adjustment to change.¹⁹⁶

Sickness funds are self-governed corporate entities under public law,¹⁹⁷ and deliver health care in cooperation with the providers (physicians,

194. This Act contained several titles covering health insurance, workers' compensation and retirement benefits. A separate act for health insurance was adopted in 1988, the SGB V.

195. INGWER EBSSEN, *AUTONOME RECHTSSSETZUNG IN DER SOZIALVERSICHERUNG* [AUTONOMOUS RULEMAKING IN SOCIAL INSURANCES], VSSR 57 (1990) (quoting Kaiserliche Botschaft, Verhandlungen des Reichstags, 5. Legislaturperiode, Erste Session 1881, Bd. 1, S. 1 ff [Deliberations of the National Parliament, Fifth Term, First Session 1881, Vol. 1, at 1]). Associations as the expression of society's communitarian spirit have been analyzed at length by German jurists. See, e.g., OTTO VON GIERKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* [THE GERMAN LAW OF ASSOCIATIONS] (1887). In opposition to the economic liberalism of Kant, von Gierke's approach was labeled "economic communitarianism."

196. BverfGE 33, 125, 156.

197. *Körperschaften des öffentlichen Rechts*, Art. 4, SGB V. Self-governance and status as corporate entities under public law are particularities of the delegation of rulemaking authority

dentists, psychologists, hospitals and pharmacists). These operate as independent businesses but are subject to regulation.¹⁹⁸ Both sickness funds and physicians are represented by regional associations (plan physician membership is mandatory)¹⁹⁹ with elected assemblies and boards. All associations are corporate entities under public law. While there are several federal sickness fund associations representing the different fund categories, there is only one Federal Physician Association.²⁰⁰ The federal associations of both parties to the system of self-governance annually renegotiate a collective national agreement²⁰¹ stipulating the framework for the provision of care and provider compensation. This agreement includes a fee scale based on relative value units for fee-for-service payments, and capitation for certain basic services. It also lists quality control guidelines in agreement with SGB V, Art. 135, for specialized diagnostic and treatment procedures such as MRI, dialysis, radiology and nuclear medicine, pace makers, ultrasounds, and the cytological diagnosis of female reproductive carcinomas. It further integrates the coverage guidelines as adopted by the Joint Federal Committees of the Sickness Funds and Physician Associations under SGB V, Art. 92. These guidelines are intended to guarantee a high standard of care, not to limit benefits. So far, nineteen guidelines apply, most prominent among them the pregnancy care guideline, the early childhood screening guideline, the prescription drug guideline, and the guideline for the evaluation of diagnostic and treatment procedures for coverage purposes.²⁰²

Regional agreements, incorporating all elements of the national agreement but allowing for regional adjustments, are concluded among the regional physician and sickness fund associations. The regional agreements emphasize provider compensation, random plausibility checks

under the German system of government. Other entities enjoying this status are municipalities and counties, universities, chambers of industry and trade, public radio and television. All may autonomously promulgate charters for the regulation of their affairs, and no enabling legislation is required. HARTMUT MAURER, *ALLGEMEINES VERWALTUNGSRECHT* [GENERAL ADMINISTRATIVE LAW] 64 (12th ed. 1999).

198. The German health care delivery system does not employ anyone and in that sense is not a "national health system" as found in Great Britain and Canada.

199. *Landesverbände der Krankenkassen; Kassenärztliche Vereinigungen*.

200. *Spitzenverbände der Krankenkassen; Kassenärztliche Bundesvereinigung (KBV)*.

201. *Bundesmantelvertrag*, reprinted in *VERTRÄGE DER KASSENÄRZTLICHEN BUNDESVEREINIGUNG (DIENSTAUFLAGE DER KBV)* [CONTRACTS OF THE FEDERAL PHYSICIAN ASSOCIATION, OFFICIAL EDITION] (1998).

202. Respectively, *Mutterschaftsrichtlinie* (for pregnancy); *Kinderrichtlinie* (for early childhood screening); *Arzneimittelrichtlinie* (for prescription drugs); and *Bewertung von Untersuchungen und Behandlungsmethoden* (for diagnostic and treatment procedures). The latter guideline is applied in conjunction with the stipulations of Art. 135, SGB V.

on claims filed, and the retrospective economic review of care delivered by office, based on medical specialty. On a quarterly basis, physicians bill their associations which process and pay the claims with assets received from the sickness funds. Sickness fund revenues correspond to the premiums paid by their members. Members are not invoiced except for copayments and some dental indemnity claims.

B. Coverage, Benefits and Medical Necessity

Historically, the German health care code guaranteed the coverage of members²⁰³ but did not yet bind sickness funds and providers. Due to poor economic conditions in the 1930s, a comprehensive system of contracts between these two parties and their associations was added to the code to safeguard the health care delivery system.²⁰⁴ Today, the Coverage (Art. 1 to 66) and Health Care Delivery sections (Art. 69 to 140) are found in Chapters Three and Four of the SGB V.²⁰⁵ Coverage is comprehensive and identical for all members, and physicians and sickness funds together must ensure the delivery of care. Under SGB V, Art. 11, coverage is to be provided:

for the prevention, early diagnosis, treatment and stabilization of illness; contraception, elective sterilization, and legal abortions.²⁰⁶ Included are medical and adjunct services for rehabilitation to prevent disability or illness requiring longterm care, and services to reverse, improve or stabilize such conditions. In case of hospitalization, coverage extends to the presence of a patient's companion whenever medically necessary.

Art. 27 specifies:

Members are entitled to benefits for the diagnosis, treatment and stabilization of an illness or to control its symptoms. Coverage includes medical and dental treatment, psychotherapy, drugs, durable medical equipment, medical/surgical dressings and supplies, adjunct therapies, home care and household help,

203. *Leistungsrecht*.

204. *Leistungserbringungsrecht*.

205. The extent of future coverage may depend on the priority BSG—Bundessozialgericht, the Supreme Social Court—jurisprudence may accord to one or the other Chapter. For further discussion, see *infra*.

206. Abortions are reimbursed whenever “medically and socially” indicated. A recent amendment extended coverage to medication-induced abortions.

hospitalization, medical and other services for rehabilitation, stress testing and occupational therapy. The needs of mental health patients must receive particular attention, including adjunct therapies and rehabilitation. Fertility treatment . . . is covered.²⁰⁷

Several SGB V sections define what would correspond to the medical necessity definition in managed care plan documents:

- The quality and efficacy of the benefits to be provided by the sickness funds must correspond to the prevailing medical standard of care and be in accordance with the progress of medical science. (Art. 2)
- Contracts between physician and sickness fund associations must ensure the sufficient, appropriate and cost-effective²⁰⁸ delivery of

207. United States. General Accounting Office, 1993 German Health Reforms New Coast Control Initiatives: Report to the Chairman, Committee on Governmental Affairs, U.S. SENATE, GAO/HRD 93-103, at 25. (stating the German health care system is one of the "most comprehensive health insurance benefits programs in the world").

208. KARL HAUCK, SGB V: GESETZLICHE KRANKENVERSICHERUNG, KOMMENTAR [SGB V ANNOTATED], K § 12, at 7, 8 (Sept. 1999) (stating that cost-effectiveness expresses the fiduciary function of the State and applies to all levels of German government: federal, state and local. Cost-effectiveness under social law, as related to health care for individual members, is of relevance only when several equally effective but more or less costly treatments are available. Cost is (basically) irrelevant when a single procedure would produce the desired outcome. (Art. 1, SGB V, entitles members to the preservation, restoration or improvement of their health.) Benefits are cost-effective when the desired outcome can be achieved with an acceptable minimum of resources. "Such a cost-benefit analysis, however, is not purely economic. Qualitative medical considerations, especially the kind, duration and sustainability of the outcome, must be balanced with cost. How to quantify quality is the underlying issue, unresolved under current law, perhaps defying any kind of resolution. In a prepaid system of health care, only increasing standardization may provide a satisfactory answer.") Hauck's loose-leaf edition is continuously updated, reflecting all amendments to the code.

According to Art. 103, SGB V, cost-effectiveness reviews of physicians' practices are conducted by both physician and sickness fund associations, based on economic utilization criteria, determined by the various and changing cost containment approaches adopted by the government. Examples are sector budgets (for all of ambulatory vs. in-patient care), prescription drug budgets, and practice budgets by specialty. Penalties for violations generally are of a collective nature and, even though stipulated by the SGB V, have not been enforced in any consistent fashion. Art. 116, SGB V, provides for (economic utilization) cost-effectiveness review of hospitals to be conducted by the sickness fund associations. This application of the social law concept of cost-effectiveness has been criticized for ignoring costs incurred in cases of undertreatment requiring more expensive care later on. "In this respect, the term cost-effectiveness in social law is one-eyed: it is unrelated to general economic cost-effectiveness. It has become a singular concept resistant to abstract definition and can be understood only within the SGB V framework." Thomas Clemens, *Abrechnungsstreitigkeiten, Wirtschaftlichkeitsprüfung, Schadensregreß* [Claims Processing Disputes, Cost-Effectiveness Audits, Sanctions], in HANDBUCH DES SOZIALVERSICHERUNGS-RECHTS, BAND 1,

medical care for all insureds under the plan, in accordance with the law and the coverage guidelines established by the Joint Federal Committees (JFC)²⁰⁹, and correspond to the generally recognized level of medical expertise.(Art. 72)²¹⁰

- Sickness funds and providers must ensure care for all members as needed, in a consistent fashion, and in accordance with the generally recognized level of medical expertise. The delivery of care must be sufficient and appropriate, it may not exceed whatever is necessary, it must correspond to the professionally required level of quality, and must be cost-effective. (Art. 70)

The BSG (Bundessozialgericht, Supreme Social Court) considers Art. 27 to represent a general guarantee of coverage but no entitlement to individual benefits.²¹¹ Due to the complexity of medical care, additional decisions must follow to establish the eligibility for benefits. First, a plan physician, authorized under public law to determine "eligibility" must suspect or find illness in accordance with Art. 27, defined as an "exceptional physical or mental condition necessitating treatment."²¹² (Benefits for prevention and early screening are guaranteed under Arts. 11, 20 to 26). Once this requirement of the SGB V Coverage Chapter has been satisfied, the patient is eligible for benefits necessary for the diagnosis, cure or stabilization of an illness, or to control its symptoms. Individual treatment decisions are delegated to the attending physician who provides or orders the services required to translate the general material claim to coverage into individual benefits.²¹³ These must correspond to the prevailing standard of care and reflect the progress of medical science. (Art. 2) The delivery of care must be sufficient, appropriate and cost-effective, not exceeding what is necessary for the individual circumstances of the patient. (Arts. 70, 72) Benefits, however, may also be specified by coverage guidelines issued by the Joint Federal Committee under the SGB V Health Care Delivery Chapter (Arts. 92, 135). These guidelines are considered general and abstract criteria, to be translated into specific

KRANKENVERSICHERUNGSRECHT [HANDBOOK OF SOCIAL INSURANCE LAW, VOL. 1, HEALTH INSURANCE LAW] 918 (Bertram Schulin, ed., 1994).

209. *Bundesausschüsse der Ärzte und Krankenkassen*. For further discussion, see *infra*.

210. This article stipulates the joint contractual provider-sickness fund mandate to assure access to and the provision of medical care for all insureds. *Sicherstellungsauftrag*.

211. BSG 4 Rk 5/92, E 73, 271, 277, 290 (Dec. 12, 1993).

212. HAUCK, *supra* note 208, K § 27, at 4 (50th addition to the Annotated Code, July 2000).

213. BSGE 73, 271, 279; BSG SozR 3-2500 §30 No. 8, at 32.

benefits by the attending physicians, both in office and hospital environments.²¹⁴

C. The Joint Federal Committee

The institutions of the German universal system of health care have remained remarkably stable in spite of several successive systems of government.²¹⁵ The earliest embodiment of the Joint Federal Committees was the then-called Central Committee, established by the Berlin Agreement of 1913 as a response to a long period of conflict between sickness funds and physicians. After a series of physician strikes, the Berlin Agreement for the first time established a joint sickness fund-physician committee with equal representation, under neutral chairmanship, with the participation of neutral members, and a mandatory arbitration procedure. The private Hartmann Bund (roughly comparable to the American Medical Association) had been founded in 1900 to strengthen the physicians' position vis-à-vis the sickness funds which contracted individually with providers, thus creating total dependency. The Hartmann Bund had demanded patients' independent choice of physicians and any willing provider contracting with licensed physicians only. The joint Central Committee's initial mandate was to improve the representation of physicians' interests but also to protect the people from a collapse of the health care system. In 1923, after the expiration of the voluntary Berlin Agreement, many of its clauses were integrated into the National Social Insurances Act (RVO)²¹⁶ by the National Ministry of Labor.²¹⁷

The Central Committee, now safely anchored in public law, evolved into the National Committee mandated to further develop the mechanisms embodied in the original Berlin Agreement. The Committee subsequently received rulemaking authority and refined the law regulating the relations

214. Robert Francke, *Richtlinien, Normsetzungsverträge und neue Behandlungsmethoden im Rechtskonkretisierungskonzept des Bundessozialgerichts* [Coverage Guidelines, Norm Contracts and Innovative Procedures as Interpreted in Rulings of the Supreme Social Court], 1 DIE SOZIALGERICHTSBARKEIT 5 (Jan. 1999) (citing BSGE 73, 271, 280 and BSG SozR 3-2500 §39 No. 3).

215. This section is based on Marian Döhler and Philip Manow-Borgwardt, *Kontinuität durch Wandel: Zur Institutionsgeschichte des Bundesausschusses der Ärzte und Krankenkassen* [Continuity Through Change: The Institutional History of the Federal Committee of Physicians and Sickness Funds], in GESUNDHEITSRISEN, INDUSTRIEGESELLSCHAFT UND SOZIALE SICHERUNGEN IN DER GESCHICHTE [HEALTH RISKS, THE INDUSTRIALIZED SOCIETY, AND SOCIAL SAFEGUARDS IN HISTORY] 119 (Dietrich Milles, ed., 1993).

216. *Reichsversicherungsordnung*. This act was adopted in 1914 and covered health insurance, workers' compensation and retirement benefits.

217. Historically, oversight over health care has alternated between the Ministry of Labor and the Ministry of Health.

between physicians and sickness funds. This included the adoption of licensing procedures for physicians and the first coverage guidelines for the “cost-effective” dispensation of drugs and “electro-physical treatments” in 1925. The Hartmann Bund, willing at times to break the law to represent physicians’ interests and accused by the government of practicing “terrorism,” was now cooperating with the National Committee. Years of such cooperation between physicians and sickness funds pursuing common goals had already resulted in a much improved relationship between the parties. The National Ministry of Labor supported the development of sickness fund and physician associations and recognized their national federations as the “legal representatives of the parties’ interests” in the RVO. In 1931, the physician associations received their status as corporate entities under public law. The government had “domesticated unruly” private law associations by recognizing the importance of their contribution.

In spite of the normative authority of the National Committee, the definition of its legal relationship with the state remained amorphous—the Committee was at times designated as an “entity of the system of self-governance under agency oversight” or as a “national agency with elements of self-governance.”²¹⁸ The legal status of its guidelines, including the adoption of rules for the medical licensing boards, was equally contested but a consensus developed eventually, according the guidelines *de facto* normative status but not the force of law.

In 1931, in the middle of the international economic crisis, the National Ministry of Labor issued an RVO emergency regulation defining the relationship between sickness funds and physicians in accordance with Committee guidelines, the logical next step in the continued development of the cooperation between sickness funds and physicians. The social health insurance code thus incorporated licensing rules, patient choice of providers, capitated payments (adopted with the physicians’ approval), collective agreements, and the equal representation of sickness funds and physicians on administrative entities under public law. As a consequence of the adoption of the licensing regulations, physicians now had a public law entitlement to a contract to practice, the first step towards extending the RVO to individual physicians. The emergency regulation also provided the National Committee with *de jure* authority to promulgate binding rules under the act, a delegation of rulemaking authority unique among all social insurance laws. Government regulatory authority was preserved under default provisions. This democratic process collapsed, however, when the physicians refused to participate in Committee activities

218. Marian Döhler and Philip Manow-Borgwardt, *supra* note 215, at 125.

under the Nazi regime, and regulation reverted back to the National Ministry of Health by default.²¹⁹

After World War II, the influential pre-war role of the now-called Joint Federal Committee was not restored. Only when coverage was expanded in the sixties, the JFC adopted the pregnancy care guideline, the children's guideline and the rehabilitation guideline. The focus then was on ensuring a high standard of care, and the guidelines served the detailed interpretation of the health care code. But beginning in 1977, when the first health care cost containment provision was passed, the entities of the system of self-governance began to be instrumentalized for cost-effectiveness purposes. The JFC was now charged with the implementation of several cost control mechanisms, such as the development of a list of medications for minor ailments (common cold, headaches) to be excluded from coverage, and of the guideline for the cost-effective use of major medical equipment. Over time, the Committee thus has assumed different roles: initially, it served the collective interpretation and implementation of the first agreements between sickness funds and physicians, evolved into the regulatory entity of the system of self-governance, further refining the contractual relationship between the parties, then issued guidelines to uphold a high standard of care, and in recent years has increasingly provided assistance with cost containment.

D. Coverage Rulemaking under SGB V, Arts. 92, 135, and 137

Today, the Joint Federal Committee,²²⁰ as established by SGB V, Art. 91, and mandated to issue coverage guidelines under Art. 92, has a total of twenty-one members: a neutral chairperson, two neutral members, nine members representing physicians (and dentists or psychologists), three representatives of the Local Funds, two of the Substitute Funds, and one member each representing the corporate-sponsored plans, the plans by trade, and the agricultural workers, merchant marine, and mine workers plans. Should the parties be unable to agree on the neutral chairperson and the two neutral members, these are appointed by the Federal Secretary of Health in cooperation with the Federal Physician Association and all sickness fund associations. Each member has five deputies of which no more than two may participate in meetings. Whenever psychotherapy guidelines are to be drafted, the nine physician members are replaced by

219. *Id.* at 127.

220. Even though the singular is generally used, there are three JFCs covering medicine, dentistry and psychology.

five psychologists and five physicians practicing psychotherapy.²²¹ Members may not receive instructions from their associations. Proposed coverage decisions are referred to JFC working groups with generally nine members each, representing the physician and sickness fund associations. Decisions are submitted to the plenary and must be adopted by majority vote. JFC membership is uncompensated, only travel expenses and time spent working on JFC-related activities are reimbursed.

The Federal Ministry of Health has oversight over the JFC but is concerned only with the proper implementation of procedures, not the actual decision making. Coverage guidelines adopted by the JFC must be submitted to the Ministry which may object within two months to matters of law. Objections may not reflect political considerations. The Committee may cure objections within the time frame set by the Ministry, if it fails to do so, the Ministry may promulgate its own guideline. The JFC may then bring an action before the social courts. So far, however, the Committee has resolved all issues in a timely fashion, avoiding further action by the Ministry.²²²

1. Committee Activities

Since the adoption of the SGB V in 1988, the JFC's task has been the development of coverage guidelines²²³ under Art. 92 as necessary to ensure the "sufficient, appropriate and cost-effective" delivery of outpatient health care. (The JFC for dentists issues guidelines limited to dental procedures, dental prosthetics, and orthodontics.) Art. 92 mirrors the coverage members are entitled to under Art. 27 and may be expanded (the original act of 1988 did not include items 10 and 11):

The Federal Committees adopt guidelines as necessary for the delivery of health care in order to ensure sufficient, adequate and cost-effective services for the insureds; the

221. Psychologists fought for many years to be recognized and reimbursed as independent providers since reimbursement was allowed only after referral from and while under supervision by a physician. With equal representation of psychologists and physicians on the JFC for matters psychological, physicians are still able to block psychologists' decisions.

222. Karl Jung, *Leitlinien aus der Sicht des Bundesausschusses der Ärzte und Krankenkassen—Rechtspolitische und rechtspraktische Probleme* [Clinical Practice Guidelines Viewed by the Federal Committee of Physicians and Sickness Funds—Problems of Law, Application and Policy], in *ÄRZTLICHE LEITLINIEN: EMPIRIE UND RECHT PROFESSIONELLER NORMSETZUNG* [MEDICAL GUIDELINES: EMPIRICAL AND LEGAL FOUNDATIONS FOR SETTING PROFESSIONAL NORMS] (Dieter Hart, ed., 2000) [hereinafter *Clinical Practice Guidelines Viewed by the Federal Committee*].

223. Coverage guidelines are defined as "norms addressing acts or omissions, issued by a rulemaking entity as mandated by the SGB V."

needs of mental health patients must receive particular attention . . . Guidelines must be adopted *in particular*²²⁴ [emphasis added] for:

1. medical treatment
2. dental treatment including dentures and orthodontics
3. the early diagnosis of illness
4. pregnancy and maternal care
5. the coverage of innovative²²⁵ diagnostic and treatment procedures
6. the prescription of drugs, medical/surgical dressings and supplies, medial equipment, prosthetic devices, adjunct therapies, hospitalization, home care and socio-therapy
7. disability determination
8. the provision of medical care as required by individual circumstances, and of medical, occupational and complementary rehabilitation benefits
10. the determination of number of physicians required for adequate health care delivery
11. medical services in cases of infertility
12. contraception and legal abortions.

Examples of current guidelines (nineteen have been adopted so far) are the pregnancy care guideline (dating back to 1965), the early childhood screening guideline, and guidelines for prescription drugs (originating in the 19th century), early cancer screening, disability determination, psychotherapy and fertility treatment. Their main purpose is to guarantee the standard of care. The pregnancy care guideline is as detailed as a

224. This term indicates that the above list is not exclusive. *Ein Verwaltungstiger erhält Zähne [An Administrative Tiger Gets Its Teeth]*, 23 DER KASSENARZT 31 (1997).

225. The German term is "new" procedures. The author, however, prefers to use "innovative" because the issue concerns some of the same diagnostic and treatment services dubbed "experimental" by managed care companies.

clinical practice guideline (CPG) and sets a high standard for medical services during pregnancy. Practitioners must apply the guideline and may not undertreat. The early childhood screening guideline also has elements of a CPG.

Art. 135, in conjunction with Art. 92(1)(5), further clarifies the mandate for innovative treatment coverage determinations, introducing specific evidence-based requirements. When the NOG 2²⁶ became law on July 1, 1997, Art. 135 was significantly expanded:

Innovative medical and dental diagnostic and therapeutic procedures are covered by the sickness funds only if the Joint Federal Committee has issued guidelines under Art. 92(1)(5) recommending the acceptance of the diagnostic and therapeutic usefulness of the new procedure, its medical necessity and cost-effectiveness—also in comparison with already covered benefits—in agreement with the current state of scientific knowledge of the specialty concerned.

The JFC's scope of action now included the examination of the sufficiency, appropriateness and cost-effectiveness of innovative diagnostic and therapeutic procedures as compared to already covered benefits, in accordance with each medical specialty's state of the art. (Concerns were raised at the time that the application of internal specialty standards would lead to automatic "self-validation" but the JFC chairman, in agreement with members of the health care committee, clarified that this phrase expressed a requirement for comment by experts in the respective fields.²²⁷) Applications for such coverage determinations must be submitted by a regional physician association, the Federal Physician Association, or one of the sickness fund associations. Innovative procedures are not covered until the JFC has pronounced their diagnostic and therapeutic "usefulness."²²⁸ The revised Art. 135²²⁹ was further extended to the

226. 2 Neuordnungsgesetz NOG. BGBl. S. 1520; Bonn, 30. Juni 1997 [Health Care Code Revision Act II, German Code, June 30, 1997, at 1520].

227. *An Administrative Tiger Gets Its Teeth*, *supra* note 224. Wording was also added to include alternative therapies. *Resolution of the Health Care Committee, Art. 135(1)(1), in GESETZLICHE KRANKENVERSICHERUNG [SGB V ANNOTATED]* 84 (Wilhelm Schmidbauer and Bernhard Schmidbauer, eds., 2000).

228. *Nutzen*. The BSG has interpreted this clause as an "exclusion of a procedure from coverage until approved by the JFC" for purposes of quality control. It also considers the JFC to hold a decision making monopoly for the coverage of innovative services. Rolf-Ulrich Schlenker, *Das Entscheidungsmonopol des Bundesausschusses für neue medizinische Verfahren und Außenseitermethoden* [*The Decisionmaking Monopoly of the Federal Committee for*

evaluation of already covered benefits to ensure their continued usefulness and appropriateness under the evolving standard of care. No application by a third party is required, the Committee must act *ex officio* whenever information indicative of the need for reevaluation of a covered procedure or service is received. The JFC has thus become the major coverage decision maker for outpatient treatment.²³⁰

Furthermore, a Hospital Committee²³¹ for the evaluation of current and innovative diagnostic and treatment procedures in hospitals, modeled after the JFC, was created by the Social-Democratic Reform 2000 under SGB V, Art. 137(c), thus eliminating an important legislative gap. Evaluations must be based on the current state of scientific knowledge, and the Art. 92 criteria, "sufficiency, appropriateness and cost-effectiveness," continue to apply.

Contrary to Art. 135, however, no mention is made of "diagnostic and therapeutic usefulness," resulting in a less stringent evaluation standard. This was criticized by the JFC chairman, also sitting on the Hospital Committee, who expressed concerns related to the absence under Art. 137(c) of adequate procedures and a sufficient organizational structure for the initiation and implementation of evaluations, and the promulgation of Hospital Committee decisions.²³² Art. 137(e) established a Coordinating Committee,²³³ a working group of all associations represented on both the JFC and the Hospital Committee. Its task is the coordination of committee activities resulting in a uniform set of criteria for the appropriate and cost-effective delivery of in- and outpatient care, relying on evidence-based clinical practice guidelines. The Committee is expected to issue such guidelines for at least ten illnesses per annum for which there are indications of the delivery of inadequate, inappropriate or excessive care, the elimination of which may affect population morbidity and mortality.²³⁴ Conceived as a working group, the Coordinating Committee lacks independent legal status but its decisions will bind the sickness funds,

Innovative Medical Procedures and Alternative Treatments], 9 NEUE ZEITSCHRIFT FÜR SOZIALRECHT 411 (1998).

229. Art. 135(1)(3), SGB V.

230. For further discussion, including some of the limitations of the scope of the JFC's rulemaking authority and resources, see *infra*.

231. *Ausschuss Krankenhaus*.

232. Karl Jung, *Rechtliche Grundlagen des Bundesausschusses auch nach der GKV-Reform 2000 unzureichend [Inadequate Legal Foundations for the Federal Committee Persist after Adoption of the Reform 2000]*, KRANKENVERSICHERUNG 52 (March 2000) [hereinafter *Inadequate Legal Foundations*].

233. *Koordinierungsausschuss*.

234. Art. 137(e)(3)(1), SGB V.

hospitals and plan physicians.²³⁵ So far, neither the Hospital Committee nor the Coordinating Committee have promulgated guidelines. Whether and how they will be able to accomplish their mission remains to be seen.

2. Rulemaking Procedures

Art. 92, as of its earliest version in 1988, has mandated notice and comment procedures for JFC coverage guideline development. Initially limited to the prescription drug guideline, the article required that experts in pharmacology, representatives of the pharmaceutical industry and the pharmacist associations were to be heard.²³⁶ It was amended to currently include the medical specialty associations for alternative treatments, the midwives association, the organizations representing the manufacturers and service providers for prosthetic devices, hearing aids, other medical devices and equipment, the providers of preventive and rehabilitative services, both public and private home care providers, and dental technicians. At the Committee's discretion, additional parties may be heard. All opinions must be duly considered and included in the final coverage guideline decision. Deliberations are not open to the public.

The neutral JFC chairman has criticized the absence of a coherent legislative concept covering all procedural aspects of the hearing process such as the scope of notice and comment, the specific parties to be heard, whether comments should be presented orally or in writing, when and to which extent documentation should be made public and responses to requests for information be provided, and the absence of a well-defined obligation of the JFC to justify its decisions.²³⁷ The Committee therefore issued additional, more stringent rules of procedure specifying, for example, that any interested party may be heard or submit comments, once appropriate notice of the subjects under consideration has been given. Comments are distributed to all Committee members.

235. The sickness funds and Social-Democratic members of Parliament would have preferred a corporate entity under public law, making the Coordinating Committee a strong umbrella organization for all federal committees.

236. This was the result of the lobbying onslaught on the federal government before the reference price system was adopted as one of the major innovations of the new SGB V. With drug profit margins for both manufacturers and pharmacies exceeding the international average by far, the government introduced reimbursement ceilings by drug, the so-called "reference prices." These do not apply across the board, exempting innovative and patented drugs, for example. Currently, 46.5% of total drug expenditures by the universal health care system cover medication subject to reference prices. *Bundeskartellamt stoppt neue Festbeträge für Medikamente* [Federal Antitrust Agency stays new Reference Prices for Drugs], FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 29, 2001, at 13. In spite of the price regulations, drug supply shortages as currently experienced in the United States are unlikely in Germany.

237. *Inadequate Legal Foundations*, *supra* note 232, at 53.

Art. 135, contrary to Art. 92, does not contain any notice and comment clauses, considered to be a serious legislative omission since the Art. 135 process leads to coverage exclusions while the Art. 92 process rarely does. Once again critical of the legislators' abdication, the JFC issued its own procedural guidelines.²³⁸ Medical services to be evaluated must be clearly defined and their indication specified. The JFC working groups must give notice of the procedures to be evaluated in the Federal Register and in the *Deutsches Ärzteblatt*.²³⁹ Comments are solicited from medical experts, specialty societies, and, whenever relevant, from associations of manufacturers of medical products and equipment. The working groups may hear expert testimony, and both written and oral opinions should be based on a questionnaire developed by the respective working group. Adequate time must be provided for the submission of comments.

Applications for innovative procedure coverage under Art. 135 must describe the usefulness of the new procedure, its medical necessity, and its cost-effectiveness compared to already covered care. The "usefulness" of the procedure must be supported by effectiveness studies for the specified indication, evidence of the therapeutic results of a diagnostic procedure, outcome evaluations including side-effects, and usefulness data in comparison with other procedures used for the same purpose. "Medical necessity" is to be shown through data detailing the relevance of the clinical issue, the epidemiology of the syndrome, the spontaneous course of the illness, and diagnostic and therapeutic alternatives. "Cost-effectiveness"²⁴⁰ must be addressed by estimating costs per patient, balancing costs and benefits per patient, balancing costs and benefits for the insured community, including follow-up costs, and by balancing costs and benefits in comparison with other treatment approaches.

Because the JFC must prioritize applications, data showing the diagnostic/therapeutic relevance for certain illnesses, the inherent risks of the procedure and its likely economic impact should also be submitted.

238. *Richtlinien des Bundesausschusses der Ärzte und Krankenkassen über die Einführung neuer Untersuchungs und Behandlungsmethoden und über die Überprüfung erbrachter vertragsärztlicher Leistungen gemäß §135 Abs. 1 i. V. m. §92 Abs. 1 Satz 2 Nr. 5 SGB V*, 1. Jan. 1998 [Guidelines of the Joint Federal Committee of Physicians and Sickness Funds for the Coverage of Innovative Diagnostic and Therapeutic Procedures and the Evaluation of Covered Medical Services Under §135(1) in Conjunction with §92(1)(5)], in HAUCK, *supra* note 208, C 455, at 1 (Jan.1, 1998).

239. This is the official publication of the Federal Physician Association.

240. The JFC cost-effectiveness definition strives to avoid being "one-eyed," *see Bundesausschüsse der Ärzte und Krankenkassen*, *supra* note 209, by requiring the "balancing" of costs and benefits and by addressing follow-up costs.

The JFC then classifies applications for therapeutic innovations according to: (I) evidence based on at least one randomized, controlled study, conducted and published in agreement with internationally recognized standards (good clinical practice, such as GCP according to Consort); (IIa) evidence derived from other prospective studies with clinical intervention; (IIb) cohort or case-controlled studies, preferably involving more than one group of subjects; (IIc) time-series studies or comparisons between sites with and/or without clinical intervention; (III) opinions of recognized experts, correlational observations, pathophysiological discussions or descriptions; expert committee reports, consensus conferences, case studies.

Diagnostic procedures are classified by considering: (I) evidence based on at least one randomized, controlled study, conducted and published in agreement with internationally recognized standards; (IIa) evidence based on prospective diagnostic studies using validated numerical targets (so-called "gold standards"), conducted under routine clinical conditions accompanied by sensitivity, specificity and predictive value calculations; (IIb) evidence derived from studies using populations with a health status determined at the outset of the study using validated numerical targets (gold standards), indicating at least sensitivity and specificity data; (IIc) evidence from studies of populations with a predetermined health status using non-validated diagnostic coefficients resulting in at sensitivity and specificity data; (III) opinions of recognized experts, correlational observations, pathophysiological discussions or descriptions; expert committee reports, consensus conferences, case studies.

Whenever the JFC has approved an innovative therapeutic or diagnostic procedure, recommendations for required provider qualifications, equipment standards and quality control measures are published simultaneously in order to ensure the appropriate application of the new method. The national sickness fund and physician associations may then jointly issue additional detailed quality control requirements. Procedures rejected as not meeting the statutory coverage criteria are publicized as well.

Should the JFC have failed to rule on a new procedure or have done so in a timely fashion²⁴¹ but treatment was provided and reimbursement denied by the sickness fund, patients may bring an action before the social courts under Art. 13, SGB V, allowing payment for care required by

241. *Systemversagen*. Whenever the JFC has failed to rule on the coverage of a new method in a timely fashion, the reimbursement of services will be permitted under Art. 13, contingent on case-by-case medical necessity determinations by the sickness funds and their Medical Services.

individual circumstances. The social court will then apply the “acceptance” standard to determine whether the procedure has become part of medical practice and is supported in the literature. Sickness fund payment decisions, however, are based on effectiveness and appropriateness criteria, a contradiction not yet resolved by the BSG.²⁴² Since the Court has concluded that the judiciary lacks the competence to make “medical-scientific” determinations²⁴³, and the legislative has conveniently delegated most of the responsibility for politically difficult choices to the JFC, patients, according to some authors, are left without the protection of the law.²⁴⁴

3. Conclusion

In spite of the remaining procedural weaknesses, the coverage determination process is public and transparent. Both Arts. 92 and 135 refer to generally recognized or prevailing standards of medical knowledge as standard for currently covered and innovative benefits. Patients are entitled to care in keeping with the progress of medical science (Art. 2), and physicians are obligated to provide it (Art. 70). According to the JFC chairman, coverage guidelines should therefore be based on the expertise of competent organizations and institutions²⁴⁵, and on evidence-based criteria reflecting the prevailing standards and scientific progress inherent in clinical practice guidelines (CPGs). These are also relied upon by experts whose comments on proposed coverage guidelines are required by law or JFC statutes. CPGs are developed by medical specialty societies, the Federal Physicians’ Chamber,²⁴⁶ and the AWMF (Working Group of Scientific-Medical Societies). The Chamber and the Federal Physician Association²⁴⁷ (represented on the JFC) have jointly established a

242. Schlenker, *supra* note 228, at 415.

243. BSGE 81, 54, 70, 72.

244. Ruth Schimmelpfeng-Schütte, *Richtlinienggebung durch den Bundesausschuß der Ärzte und Krankenkassen und demokratische Legitimation [JFC Guidelines and Democratic Legitimacy]*, 11 NEUE ZEITSCHRIFT FÜR SOZIALRECHT 530, 534 (1999).

245. *Clinical Practice Guidelines Viewed by the Federal Committee*, *supra* note 222.

246. *Bundesärztekammer*. Its regional member chambers (*Landesärztekammern*), corporate entities under public law, represent physicians’ interests, and adopt and implement the rules for the practice of medicine. They are roughly comparable to U.S. state boards monitoring the application of the professional code of ethics, continuing education requirements, and other rules and regulations controlling the exercise of the medical profession. All are components of the system of health care self-governance.

247. *Arbeitsgemeinschaft der wissenschaftlichen medizinischen Fachgesellschaften*. The AWMF’s website is available for view at <http://www.uni-duesseldorf.de/WWW/AWMF>.

Clearinghouse for Medical Quality Control.²⁴⁸ It develops CPGs for in- and outpatient delivery of care, supports both federal associations when contracting with sickness funds and hospitals, and coordinates the quality control activities of all associations on the federal level. It has also issued a "checklist for guidelines," a step-by-step roadmap to ensure guideline quality and validity. In 1999, all federal entities of the system of self-governance representing physicians, sickness funds and hospitals adopted a joint project to promote the quality of guidelines in cooperation with the AWMF. Based on both Clearinghouse and AWMF criteria, a Guideline Manual for the development, adaptation or implementation of guidelines was published in October 2000.²⁴⁹ Increasing cooperation among all parties will contribute to quality of care improvements since valid CPGs translated into coverage guidelines would influence the daily practice of medicine.²⁵⁰

E. The Democratic Legitimacy of the Federal Committee Guidelines

1. The Guidelines' Legal Status

Public law associations autonomously adopt charters which have the force of law. But laws must result from a democratically legitimate process: associations, representing a limited number of citizens for a particular purpose, must have democratically constituted rulemaking bodies such as elected assemblies and boards. Sickness fund and physician associations meet this requirement but the democratic legitimacy of the Joint Federal Committee and its coverage guidelines has been a matter of much dispute. The SGB V of 1988 strengthened the normative force of the guidelines by integrating them into the federal collective agreements negotiated by the federal associations of sickness funds and physicians, and thus into the regional collective agreements as well. But the legal status of the guidelines and their external application to the insureds continues to be discussed and questioned in the literature.

Until 1996, the BSG had held that guidelines were only internal administrative rules binding the JFCs' member associations, without

248. *Ärztliche Zentralstelle Qualitätssicherung*. This organization considers and uses standards and definitions of the Institute of Medicine (IOM) and the former Agency for Healthcare Policy and Research (AHCPR).

249. *Leitlinien-Manual*, at <http://www.uni-duesseldorf.de/AWMF/II/IImanual.htm>. The Manual, with 2001 updates, is available at this site for purchase or for download in Adobe Portable Document File format.

250. Whenever clinical practice guidelines become part of the social law coverage guidelines, the physicians' conflict between the cost-containment requirements of social law and the civil law malpractice standard is resolved as CPGs represent the civil law standard of care.

normative effects on individual sickness funds and providers. Guidelines could be applied to such third parties²⁵¹ only through their integration into the regional association charters.²⁵² Furthermore, guidelines could not limit members' material claims to comprehensive health care under Art. 27.²⁵³ The BSG thus gave clear precedence to the coverage and benefit entitlement sections (Chapter Three, Arts. 11-66) of the SGB V over its administrative health care delivery sections (Chapter Four, Arts. 69-140), emphasizing the rights of patients to treatment over administrative decisions by the JFC (established by Art. 91 of Chapter Four).²⁵⁴ This approach also helped bridge the inconsistencies between the coverage and health care delivery aspects of the law, enabled the providers to provide legal individualized services, protected the patients, and required the sickness funds to accept medical judgment. Concurrently, physicians were bound by the coverage guidelines and all collectively agreed upon contractual conditions of health care delivery.

On March 20, 1996,²⁵⁵ however, the Supreme Social Court ruled that the JFC is an "institution" under public law with rulemaking authority limited to specific interpretations of the law.²⁵⁶ Even though such institutions, contrary to corporate "entities" under public law, are established to fulfill a certain purpose without the democratic representation of members, they too may adopt charters and participate in a system of self-governance. Relying on SGB V, Art. 92(8) (the JFC coverage guidelines are components of the federal collective agreements between sickness fund and physician associations), Art. 82 (the federal collective agreements determine the terms of the regional agreements), Art. 83 (the regional agreements are binding for the sickness funds), Art.

251. *Drittwirkung; Aussenwirkung.*

252. Prior to 1988, guidelines were declared "binding" in the charters of the regional sickness fund and physician associations, endowing them with only questionable applicability to third parties. This issue had never been resolved. Ebsen, *supra* note 195.

253. Peter Hinz, *Der Bundesausschuss der Ärzte und Krankenkassen—Status and Aufgaben* [*The Joint Federal Committee—Status and Mandate*], 7 DIE LEISTUNGEN 385 (July 2000).

254. This was also a reflection of the historical development of German health care law: one of the original purposes of the contractual arrangements between physicians and sickness funds was the delivery of health care for favorable fees. Wolfgang Gitter & Gabriele Köhler-Fleischmann, *Gedanken zur Notwendigkeit und Wirtschaftlichkeit von Leistungen in der gesetzlichen Krankenversicherung und zur Funktion des Bundesausschusses der Ärzte und Krankenkassen* [*Reflections on the Necessity and Cost-Effectiveness of Benefits under the SGB V and the Function of the Joint Federal Committee*], 1 DIE SOZIALGERICHTS BARKEIT 1 (1999).

255. BSG 6 Rka 62/94, March 20, 1996, *Methadonurteil* [*"The Methadone Ruling"*], 3 MedR 123 (1997).

256. *Anstalt des öffentlichen Rechts mit begrenzter Rechtsfähigkeit mit der Aufgabe der konkretisierenden Rechtssetzung.*

95 (the regional agreements bind individual providers), and Art. 81 (the regional physician association charters must contain clauses to make the guidelines binding on association members), the Court reversed its earlier interpretation of the law and held that the JFC guidelines have the same normative effect on sickness funds and physicians as the federal and regional collective agreements concluded by their associations. This confirmed the separate rulemaking authority of the Joint Federal Committee, independent of its constituent corporate entities under public law governing the health care system. Furthermore, the BSG reversed the primacy of the SGB V coverage and benefit entitlement sections over the sections regulating the administration of the health care delivery system, thus permitting administrative interventions in an area so far mainly controlled by physicians.

The applicability of the new approach to the patients as third parties was resolved by analyzing the internal consistency of the law.²⁵⁷ Chapter Three (coverage and benefits) of the SGB V calls for JFC guidelines detailing the material claims for benefits by members under SGB V, Arts. 27 (a)(4) for fertility treatment, and Art. 29(4) for orthodontics in agreement with Art. 92 of Chapter Four (the health care delivery system). Without such a specific mandate, Art. 92(1) was considered the default clause granting general JFC rulemaking authority ("Guidelines must be adopted to ensure the sufficient, adequate and cost-effective delivery of care"). According to the BSG, Art. 92(1) is logically related to Art. 12(1) of Chapter Three, requiring the "sufficient, adequate and cost-effective" provision of benefits to individual patients. Art. 72(2) of Chapter Four once again reiterates these terms when stipulating the joint obligation of sickness fund and provider associations to deliver care. The BSG thus found the guideline application to patients to be implied in the SGB V.

Five BSG decisions, announced on September 16, 1997,²⁵⁸ confirmed the far-reaching delegation of rulemaking authority to the JFC,²⁵⁹ dubbed "one of the traditional components of German health care law" by the Court. In all five cases, the BSG denied patients' claims for reimbursement by the sickness funds of treatments not considered covered

257. BSG 6 Rka 62/94, March 20, 1996; Hinz, *supra* note 253.

258. BSG 1 RK 28/95, SozR 3-2500 §135 No. 4.; BSG Az 1 RK 17/95; 1 RK 14/96; 1 RK 30/95; 1 RK 32/95.

259. The BSG assumed the constitutionality of the scope of the delegation by declaring that the Constitution does not contain a *numerus clausus* provision, limiting the categories of rulemaking approaches. Still, the constitutionality of the Committee rulemaking authority is hotly contested by constitutional law scholars and experts. The final arbiter, the Constitutional Court, has not yet been seized with the issue.

by the SGB V. Three decisions relied on the exclusion by the JFC of immuno-augmentative therapy for multiple sclerosis from coverage.²⁶⁰

Building on the March 3, 1996, opinion, the Court considered the binding normative effect of the JFC guidelines on patients as flowing from the systematic unity of SGB V Chapters Three and Four. The analysis turned in particular on Art. 2, entitling members to the provision of benefits in accordance with the prevailing state of medical knowledge and the progress of medical science. The JFC was thus given a central role in coverage decision making under the SGB V, shifting more of the complex application of the SGB V from legislators to a body of experts. This responsibility is shared with federal and regional physician and sickness fund associations which must initiate the innovative treatment evaluation but may not block nor delay such proceedings which are subject to the Art. 2 provisions.²⁶¹ But in light of the multitude and complexity of prevailing and innovative practices, and the resources required for their evaluation, the current capacity of the JFC to rule on comprehensive coverage while ensuring adequate transparency and the rule of law is in doubt.

Furthermore, the scope of the JFC rulemaking authority has been successfully challenged in court. The BSG, even though recognizing the Committee's authority to issue guidelines to "concretize" the general health care entitlement clauses of the SGB V, limited the Committee's ability to adopt exclusions.²⁶² It rejected the JFC Viagra coverage exclusion argument that sickness funds would be prevented from "appropriately managing" the cost-effective provision of health care as merely addressing administrative difficulties, insufficient justification for a coverage exclusion reserved to the legislator under Art. 34, SGB V.²⁶³ Because erectile dysfunction meets the statutory definition of illness of Art. 27, SGB V, and can have differing etiologies (in this case a chronic, age-unrelated condition), the JFC may not prohibit reimbursement of a drug approved for its effectiveness independent of a patient's individual circumstances. Relying on the BSG opinion, a state court approved

260. In another case, the treatment received by one of the plaintiffs was not considered the prevailing standard of care since practiced by one physician only. In the fifth case, the reimbursement of acupuncture for neurodermitis was denied because medical science had not increasingly relied on such treatment for this indication.

261. Schlenker, *supra* note 228, at 415.

262. BSGE 85, 36, 45, Sept. 30, 1999. 37 NEUE JURISTISCHE WOCHENSCHRIFT 2764 (Sept. 2000).

263. Art. 34, SGB V, excludes from coverage most over-the-counter medication. It also allows the Secretary of Health to exclude by regulation additional drugs, adjunctive therapies, and durable medical equipment of questionable usefulness.

coverage for a patient afflicted with diabetes.²⁶⁴ In another case before the BSG, the Court reversed the JFC exclusion of medically indicated podiatric services, referring to the authority of the Secretary of Health to regulate adjunct therapies under Art. 34.²⁶⁵ Both BSG rulings clarify that the guidelines may “concretize” adequate, appropriate and cost-effective care but may not exclude from coverage a particular illness nor adjunct therapies and specific drugs, a power reserved to the Secretary of Health.

In addition, one state court, ruling in three cases brought by three pharmaceutical companies, imposed temporary injunctions against the prescription drug guideline in 1999.²⁶⁶ A state supreme court, finding that all provisions of the guideline applicable to the products of a pharmaceutical manufacturer violated antitrust law, issued an injunction in January 2000.²⁶⁷ The JFC chairman deplored these actions leading to a temporary stay of the development of guidelines potentially subject to further antitrust actions, accused physicians and the pharmaceutical industry of jointly stymieing all efforts to “clean up” the drug market, and called for a legislated solution.²⁶⁸ He also advocated exclusive social court jurisdiction over guideline-related issues as matters of public not civil law. The national legislature under Social Democratic leadership agreed and amended Art. 69, SGB V accordingly. Since sickness funds and their associations are exercising a public law function, they do not act as private law corporations, and antitrust law does not apply.²⁶⁹

2. Legal Norms Based on Contract?

As most elements of the German health care system, collective norm setting based on contract is rooted in history.²⁷⁰ Many of the provisions of

264. SG Lüneburg, S 9 KR 97/99, Feb. 2, 2000. 37 NEUE JURISTISCHE WOCHENSCHRIFT 2766 (Sept. 2000).

265. BSG B 1 KR 9/97 R. Nov. 16, 1999.

266. LG Hamburg, AZ 315-0-115/99, 129/99, 143/99 (March 31, 1999).

267. OLG München (Jan. 1, 2000).

268. *Inadequate Legal Foundations*, *supra* note 232. Before the adoption of the SGB V in 1988, more than 60,000 prescription and OTC drugs were on the German market, often combining different active ingredients without therapeutic justification but favored by the “consumer” and the drug companies. Currently, 40,000 drugs remain.

269. HAUCK, *supra* note 208, at Art. 69. *See also* GESETZLICHE KRANKENVERSICHERUNG [SGB V ANNOTATED] 44 (Wilhelm Schmidbauer et al., eds., 2000) (discussing legislative intent). In addition, the relationships between sickness funds and their associations and providers and their associations are regulated exclusively by Chapter Four, SGB V. *See generally* Art. 69, SGB V.

270. This section is based on Klaus Engelmann, *Untergesetzliche Normsetzung im Recht der gesetzlichen Krankenversicherung durch Verträge und Richtlinien* [Rulemaking Through

the civil law Berlin Agreement of 1913, regulating the relationship between physicians and sickness funds, were entered into the national insurance act of 1923. The Joint Committee of Physicians and Sickness Funds, one of the historical predecessors of the current JFC, was instituted to resolve the details of health care delivery by plan physicians through the issuance of (then indirectly normative) "guidelines." Their main purpose was to facilitate the cooperation between physicians and sickness funds, with only minor references to coverage. Eventually, the contractual relationships between physicians and sickness funds began to evolve into collective agreements which became the foundation of the health care system of self-governance when the national insurance act was revised in 1932.

Furthermore, medical care has always been prepaid.²⁷¹ Sickness funds as the "arrangers" of health care contracted with providers for the delivery of services. Therefore, norms based on contracts helped specify the details of the provision of prepaid care, a process carried forward through successive versions of the national health care law. Today, the SGB V requires collective contracts between physician and sickness fund associations as corporate entities under public law, mandated to jointly guarantee and govern health care delivery. JFC guidelines are seen as collectively agreed-upon norms characteristic of the German health care system.²⁷² But how legitimate are the guidelines?

On September 16, 1997,²⁷³ the BSG ruled that patients' claims to health care are limited by the coverage definition of Chapter Four of the SGB V, regulating the delivery of health care and the issuance of coverage guidelines. "This Chapter determines the extent of coverage materially and formally; the insureds may not claim benefits beyond coverage as defined herein." The general statutory claim to comprehensive coverage in case of illness of Chapter Three (Art. 27) thus was made subject to interpretation by rulemaking as delegated to the JFC.²⁷⁴ Opponents of the now expanded normative character of the coverage guidelines consider the delegation of such rulemaking authority to the JFC a violation of fundamental constitutional rights, based upon the non-delegation

Collective Contracts and Coverage Guidelines as a Component of the Health Care Act], 1 NEUE ZEITSCHRIFT FÜR SOZIALRECHT 1, (2000).

271. This system was preferred over indemnity plans as guaranteeing more "social protection" but also more control over the appropriate, adequate and cost-effective delivery of care for the country. *Id.*

272. *Rechtssetzung durch Vertrag*. Engelmann, *supra* note 270, n.255.

273. Engelmann, *supra* note 270, n.241 (citing BSG 1 RK 28/95, SozR 3-2500 §135 No. 4).

274. Health care has now joined environmental protection and other complex technical and scientific fields for which traditional laws have become inadequate mechanisms of control.

doctrine.²⁷⁵ Fundamental rights and values, including “freedom, life and physical inviolability”²⁷⁶, are subject only to the legislative powers of parliament. Whether a fundamental right has been violated is to be analyzed case-by-case by the Constitutional Court. It has been argued,²⁷⁷ however, that the coverage and health care delivery sections (Chapter Four) of the SGB V are complex, and legislating details of the provision of medical services exceeds the resources of parliament. For decades, “the judiciary has proven that it is capable of construing vague statutory terms and clauses without diminishing the protection of the law afforded to the people.”²⁷⁸

Even when accepting the validity of rulemaking delegation to the JFC on behalf of physician and sickness fund associations, some authors question the applicability of JFC guidelines to the patients. In 1996, the 6th Senate of the BSG ruled that patients were “passive beneficiaries”, not active participants in the implementation of the health care law, and no separate justification for the extension of guideline applicability to them was required. But are violations of the non-delegation doctrine really contingent on individuals’ active or passive role within a norm setting process, or isn’t it rather the degree to which the ensuing norm affects their rights?²⁷⁹ The 1st Senate, in 1997, concurred with the 6th Senate while dissenting from its analysis: JFC guidelines as norms based on collective contracting are integral elements of a system of rules intended to ensure the provision of medical care, and thus applies to all patients. Some authors, however, consider the patients’ absence from the rulemaking process as undermining its democratic legitimacy.²⁸⁰

Another strand of criticism cuts even more deeply. It disputes the norm setting authority of physician and sickness fund associations, partners

275. Raimund Wimmer, *Verfassungsrechtliche Anforderungen an untergesetzliche Rechtsetzung im Vertragsarztrecht*, [Constitutional Limitations to Normsetting Procedures under the SGB V Health Care Provider Sections], 9 MEZINRECHT 425 (1996).

276. Constitution of the Federal Republic, Art. 2(2). In combination with Art. 20 (“The Federal Republic is a democratic, socially responsible state”), the rights to an existential minimum, health care and informed consent (“patient autonomy”) have been inferred by the Constitutional Court.

277. Klaus Engelmann, *Das Rechtskonkretisierungskonzept des SGB V und seine dogmatische Einordnung durch das Bundessozialgericht* [The Construction of the SGB V and its Dogmatic Classification by the Supreme Social Court], in *ÄRZTLICHE LEITLINIEN: EMPIRIE UND RECHT PROFESSIONELLER NORMSETZUNG* [MEDICAL GUIDELINES: EMPIRICAL AND LEGAL FOUNDATIONS FOR SETTING PROFESSIONAL NORMS] (Dieter Hart, ed., 2000). Justice Engelmann is Chief Justice of the 6th Senate of the Supreme Social Court.

278. *Id.*

279. Schimmelpfeng-Schütte, *supra* note 244, at 533.

280. *Id.*

to the collective agreements. Hence none of the institutions established by them, including the JFC, may issue any generally applicable rules or coverage guidelines. The legislator should remedy this "legal vacuum" because of guideline impact on the constitutional rights of patients, providers, and of those who sell to the health care system.²⁸¹

Others argue alternatively that the increasing complexity of allocative and medical decision making requires an effective intermediate-level system of norms, consisting of collective agreements and guidelines, constituting flexible elements of law with limited applicability, and promoting the interplay between the state, the legislator, administrative entities, and other relevant institutions such as public and private associations.²⁸² While funding was not an issue, health care laws could be executed satisfactorily through the application of professionally and medically-scientifically derived standards, preserving the quality of the provision of care. But at a time when health care cost containment measures are considered unavoidable, decision making must be delegated to administrative rulemaking entities of the system of self-governance to ensure the continued availability of "sufficient, appropriate and cost-effective" care,²⁸³ respecting the standard mandated by law.

IV. CONCLUSION

Two more divergent approaches to coverage and "medical necessity" are difficult to conceive. The German health care code, the SGB V, may appear overly complex to American readers, "big government" seemingly practicing medicine and limiting individual freedom. But the code was drafted to protect the dignity and autonomy of patients and their families at times of need, the autonomy of providers to practice medicine according to the standards and values of their profession, and to guarantee a high standard of care for everyone. In this spirit, the SGB V mandates comprehensive universal coverage for the prevention, diagnosis, and treatment of illness. Only physicians can translate these general material claims to care into specific benefits. They must assess each individual patient's circumstances and provide or arrange for needed procedures and

281. Raimund Wimmer, *Grenzen der Regelungsbefugnis in der vertragsärztlichen Selbstverwaltung* [Limits of Rulemaking Authority within the System of Physician Self-Governance], 3 NEUE ZEITSCHRIFT FÜR SOZIALRECHT 3 (1999).

282. Robert Francke, *Richtlinien, Normsetzungsverträge und neue Behandlungsmethoden im Rechtskonkretisierungskonzept des Bundessozialgerichts* [Coverage Guidelines, Norm Contracts and Innovative Medical Procedures: New Approaches to Interpreting Legislation as seen by the Supreme Social Court], 1 DIE SOZIALGERICHTSBARKEIT 8 (Jan. 1999).

283. *Id.*

services. The SGB V thus relies on physician autonomy for the appropriate case-by-case delivery of health care, according to the prevailing standards of medical practice and in keeping with the progress of medical science.

Clinical decisionmaking, however, must respect the boundaries set by budgets for practices by specialty, adjusted for regional variations of risk, and for prescription drugs.²⁸⁴ Furthermore, capitation for some basic services shifts part of the morbidity risk to providers who, just as their American colleagues, must now micro-allocate care. Sickness funds and physician associations jointly conduct economic reviews of individual physicians' practices. Individual or collective monetary sanctions are imposed for expenditures exceeding a predetermined range. National coverage "guidelines" for innovative treatments and technology result in another, increasingly weighty, limitation on physician autonomy. But guidelines by law are jointly negotiated by sickness funds and physician organizations, just as aspects of quality control, standards of care, and physician compensation. Through their participation in the collective self-governance of the health care system, physicians therefore have a formal role in the decision making process affecting the exercise of their profession. Resulting from the communitarian German tradition of social insurance, the health care system enjoys a high degree of acceptance among both members and providers, and proposed amendments trigger a heated, sometimes acrimonious, public debate. Recent reform and cost control efforts have met with general discontent, and any fundamental modifications would be rejected by all parties concerned.

In the United States, coverage for a majority of the population is negotiated between private managed care companies and employers. Policies list benefits and exclusions, while internal guidelines and criteria subject physicians' treatment proposals to stringent corporate "medical necessity determinations,"²⁸⁵ effectively transferring medical decision making to a third party outside of the physician-patient relationship. Many

284. The current system of funding health care by assessing personal income up to a specific bracket has been criticized because sickness fund revenue becomes insufficient at times of high unemployment, early retirement to promote job creation, and an aging population. Health care fund availability is thus limited by external factors such as labor market policies and demographics. Sickness funds may not raise premiums as the law mandates "premium stability."

285. See M. Gregg Bloche, *Medical Care and the Enigma of Efficiency*, in SOCIAL SCIENCE RESEARCH NETWORK ELECTRONIC PAPER COLLECTION 71 (1999), available at http://papers.ssrn.com/paper.taf?abstract_id=184275. See also Lothar Krimmel, *Was ist "medizinisch notwendig"?* [What is "Medically Necessary"?], 94 DEUTSCHES ÄRZTEBLATT, at C16 (1997) (stating that "medical necessity" is considered "vacuous" and a "meaningless metaphor" in both countries). Dr. Krimmel is past president of the Federal Physician Association.

physicians' clinical autonomy is subject to additional corporate control through payment arrangements (financial incentives and capitation) and provider profiling. Practitioners exceeding corporate utilization and appeals benchmarks are dropped from the managed care network. Physicians, lacking the protection of national health care legislation and an effective system of self-governance, are prohibited by antitrust law from forming unions to negotiate quality of services, working conditions, and payment with managed care corporations. Considerable nationwide dissatisfaction with the current health care delivery system has led to the adoption of several contradictory "patients' rights bill" by Congress and increasingly comprehensive state legislation regulating managed care practices.

Common to both countries are cost containment efforts through standardized practice guidelines. Managed care guidelines, both corporate and commercial, are often considered "proprietary," and the methodology for their development is not available for public scrutiny. German guidelines, promulgated according to social law requirements, result from a notice and comment administrative rulemaking procedure relying on expert input but criticized because not yet completely transparent. In both countries, guidelines developed according to scientific and evidence-based criteria by medical societies do not yet have a major influence on medical practice. "A negative consequence of being sponsored by a voluntary professional organization is the lack of financial support to widely distribute information."²⁸⁶ In Germany, however, efforts are under way to develop the growing number of guidelines adopted by the Joint Federal Committee through formal cooperation with medical societies.

In both countries, there is also a clear recognition that guidelines alone can not resolve the dilemma of how to increase cost-effectiveness without compromising the delivery and quality of necessary care. "How to quantify quality is the underlying issue, unresolved under current law, perhaps defying any kind of resolution."²⁸⁷ Many prevailing practices have not been evaluated and many are not amenable to empirical validation. Furthermore, some of the most fundamental aspects of good medical care, effective clinical support and comfort at the bedside, can not be cast into standardized practice guidelines or subjected to a cost-effectiveness analysis. Any efforts to remove such "waste" from health care to increase efficiency would be misguided and ignore one of the basic purposes of medicine.²⁸⁸

286. GARTNER & MEE-LEE, *supra* note 28, at 13.

287. HAUCK, *supra* note 208, K § 12, at 8.

288. Bloche, *supra* note 285.

In the United States, there is a growing awareness that universal access to health care would remedy much of the failings of the current market-dominated system, singular among industrialized nations. "If this moment—a moment of unprecedented economic prosperity and looming budget surpluses—is the wrong one for an aggressive move towards universal health insurance, when will it be right?"²⁸⁹ But any fundamental changes to the health care system would have to be supported by culture and societal values. In the United States, the emphasis traditionally has been on individualism, the protection of individual rights, and the protection from "government interference." In Germany, solidarity among members of the national community—implying both rights and obligations—is the foundation of social insurance. Social law is seen as protective of the rights of individuals while codifying their obligations and those of society.

But laws, regulations and charters, drawn too complex and too restrictively, may impose excessive duties on individuals and the economy. Wherever there is reliance on market forces, society gains space, and government saves money. On the other hand, the market is cold, focused on profitability, blind to off-balance-sheet side-effects, and indifferent to politically defined concepts of justice. The state, predominant in the "magic triangle of state, market, and self-regulation", can weight the instruments at its disposal: effective administrative law, self-governance, and the use of market forces. German health care reform efforts continue to search for the proper balance between them. The more weight is given to cooperative structures and flexible rulemaking, the more the market forces become instrumentalized, and the more apparent the ability of legal norms to protect freedom.²⁹⁰ In order to restore patient autonomy and choice of health care options, remove generic clinical decision making from distant commercial entities and return it to physicians focussed on their patients' individual needs, a new conception of American health care law may be required.

289. *Toward Universal Coverage*, N.Y. TIMES, Sept. 24, 2000, at A14.

290. Udo di Fabio, *Verlust der Steuerungskraft klassischer Rechtsquellen* [*The Loss of Control of Classical Sources of Law*], 10 NEUE ZEITSCHRIFT FÜR SOZIALRECHT 449, 453, 455 (1998).

ALTERNATIVES FOR NON-U.S. ATTORNEYS IN THE UNITED STATES

*Farzad Damania**

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I. INTRODUCTION

With globalization there has been a visible growth in the international trade of legal services. An increasing number of attorneys from around the world come to the United States for various reasons. Most foreign¹ (“non-US”) trained attorneys come to the United States for a short-term course and return to their home countries after developing a basic understanding of the American legal system. This article considers the options for those foreign attorneys who wish to be licensed in the United States. Foreign attorneys in the United States have two basic options; they can either choose a limited license through the Foreign Legal Consultant (“FLC”) route, or they can become fully licensed by appearing for, and passing, a bar examination.² This article will first look at the scope for FLCs and then examine the available choices with respect to bar examinations. Because each state³ in the United States has its own rules

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1. In some literature on the topic, “foreign” refers to attorneys from outside a particular state. In this paper, “foreign” is used interchangeably with “non-US” to refer to attorneys not from the United States.

2. This paper does not deal with immigration and other issues, which might complicate the choices for foreign attorneys.

3. The terms “state” and “jurisdiction” are used interchangeably in the paper. Not every state has enacted provisions for FLCs.

with respect to FLCs and bar admissions, this paper will also look at the provisions in each individual state. It is important to note that these rules are amended frequently and non-US attorneys should contact individual jurisdictions for current information.

II. FOREIGN LEGAL CONSULTANTS

Non-US attorneys can apply for an FLC license in twenty-four United States jurisdictions. An FLC typically advises clients only on laws of the home country in which he or she is admitted. Since the FLC does not appear for a bar examination he or she is not qualified to render advice on any other laws. In no state is an FLC permitted to give advice on the state's local laws. Some states allow FLCs to give advice on international law⁴ and some allow them to pass along advice from other licensed attorneys. Since the scope of an FLCs practice is limited and the procedure lengthy, it has not been a popular option. With the exception of New York, most states have had only a handful of FLC applicants.⁵ In New York, because there is a one-time registration process, it is unclear how many FLCs practice actively.⁶

Non-US attorneys must refer to the rules of each individual state to determine their eligibility and other unique requirements for each state. Non-U.S. attorneys should also check reciprocity requirements, as some states do not grant FLC status if the home country does not allow similar opportunities to United States lawyers.

The following table divides the restrictions on FLC practice areas into three broad categories. The table also highlights the prior experience required before an application for FLC status can be made, and includes the number of individuals licensed as FLCs from 1996 to 2000.

Though the following table classifies the scope of FLC practice into three categories, it must be noted that the language of the relevant rules do not. The classification reflects the interpretation given to the relevant

4. It can be argued that provisions restricting the scope of FLCs to advice, "only on the law of the foreign country" would include international law. The following table does not distinguish jurisdictions on the basis of this argument. The following table is a simplification of intricate provisions. Foreign attorneys must note that details in the provisions could yield outcomes opposite to those indicated in the table.

5. See Pamela Stiebs Hollenhorst, *Options For Foreign-Trained Attorneys*, 7 THE B. EXAMINER (NCBE), Aug. 1999, available at <http://www.ncbex.org/pub.htm>. One factor, which must be noted, is that NY being the commercial capital attracts a larger number of foreign attorneys. This reason alone, and not the drafting of the FLC provision could explain the large numbers in New York.

6. The problem is better exemplified by the fact that in twenty-three years only two FLCs have formally resigned in NY. See Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126 (1998).

provisions in literature on the topic.⁷ In genera, the provisions dealing with FLCs can be divided into two categories. Most states restrict the scope of practice for FLCs by stipulating that an FLC can render services “only on the law of the foreign country.” A few states have adopted the American Bar Association's model rule, which allows for a broader scope of practice for FLCs by stipulating what the FLC cannot practice.

7. See Needham, *supra* note 6.

State ⁸	Scope of Permitted Legal Work			Experience Required		Number ⁹ Individuals licensed as FLCs from 1996- 2000
	Can advise on Int'l. law and third- country law ¹⁰	Can advise on U.S. federal law and law of state granting FLC license	Can pass along advice regarding any state law	Years of active practice immediately preceeding application	Location of experience	
Alaska	No	Yes	No	5 of 7	HJ ¹¹	0
Arizona	Yes	Yes	No	5 of 7	HJ	1
California	No	No	No	4 of 6	HJ	32
Connecticut	No	No	No	5 of 7	HJ	0
District of Columbia	Yes	Yes	Yes	5 of 7	HJ	16
Florida	No	No	No	5 of 7	HJ	43
Georgia	No	No	No	5 of 7	HJ	5
Hawaii	No	Yes	No	5 of 7	HJ	9
Illinois	No	No	No	5 of 7	HJ	5
Indiana	No	Yes	No	5 of 7	Any	1
Louisiana	No	No	No	5	HJ	0
Massachu- setts	No	No	No	5	Any	3
Michigan	No	No	No	3 of 5	HJ	3
Minnesota	No	No	No	5 of 7	HJ	2
Missouri	No	No	No	5 of 10	HJ	0
New Jersey	No	Yes	No	5 of 7	HJ	5
New Mexico	No	Yes	No	5 of 7	HJ	0
New York	Yes	Yes	No	3 of 5	Any	84
North Carolina	No	Yes	No	5 of 7	HJ	0
Ohio	Yes	Yes	No	4 of 6	HJ	2
Oregon	No	Yes	No	5 of 7	HJ	0

8. Only jurisdictions with current provisions for FLC licensing are listed in this table.

9. 2000 Statistics, 1 The B. Examiner (NCBE), May 2001, available at <http://www.ncbex.org/stats.htm>.

10. It must be noted that "law of the home country" could include international treaties, (as they apply to that country) which are considered law "of that country." To illustrate, a Mexican attorney licensed as an FLC in Illinois can advise on NAFTA, (as it applies to Mexico) but an Argentinean attorney licensed as an FLC cannot.

11. Home Jurisdiction ("HJ") implies applicant must have been in active practice in country where licensed.

State ¹²	Scope of Permitted Legal Work			Experience Required		Number ¹³
	Can advise on Int'l. law and third-country law ¹⁴	Can advise on U.S. federal law and law of state granting FLC license	Can pass along advice regarding any state law	Years of active practice immediately preceding application	Location of experience	
Texas	No	No	No	5 of 7	HJ	14
Utah				discretionary ¹⁵		1
Washington	Yes	No	No	5 of 7	Any non-U.S. location	1

III. BAR EXAMINATION

Clearly the more popular option¹⁶ for foreign attorneys wishing to be licensed in the United States is to sit for a state bar examination. By passing the bar examination and satisfying other standards, non-U.S. attorneys can practice in all areas of law just like U.S.-trained attorneys. In thirty United States jurisdictions, foreign attorneys may appear for the bar examination without further education if they fulfill certain requirements. It is important to note that requirements in these states are quite stringent and most require a determination of educational equivalency. Most non-U.S. attorneys cure their deficiency in eligibility requirements by pursuing a graduate law degree (such as an LL.M.) from an American Bar Association approved school.¹⁷ In thirteen United States

12. Only jurisdictions with current provisions for FLC licensing are listed in this table.

13. 2000 *Statistics*, 1 THE B. EXAMINER (NCBE), May 2001, available at <http://www.ncbex.org/stats.htm>.

14. It must be noted that "law of the home country" could include international treaties, (as they apply to that country) which are considered law "of that country." To illustrate, a Mexican attorney licensed as an FLC in Illinois can advise on NAFTA, (as it applies to Mexico) but an Argentinean attorney licensed as an FLC cannot.

15. Utah does not stipulate a minimum length for experience, but the Utah Supreme Court may consider this factor in deciding whether to grant a license. One additional mandatory requirement in Utah is the Multistate Professional Responsibility Examination (MPRE).

16. See Hollenhorst, *supra* note 5. From 1975 to 1998, New York had a total of 277 FLCs, whereas in 1998 alone, 2047 foreign attorneys appeared for the New York bar examination.

17. It is also important to note that satisfactory completion of graduate programs does not guarantee that a graduate will pass the bar examination. Most LL.M. programs are not intended to prepare candidates for bar examinations.

jurisdictions, foreign attorneys may cure their deficiencies in eligibility by pursuing a graduate law degree. It must be emphasized that a graduate program does not guarantee eligibility for bar examination.¹⁸ Besides education qualifications, close attention should also be placed on residency and other requirements for each jurisdiction.¹⁹ The following table highlights some important requirements for foreign graduates considering bar examinations in the United States and the bar passing percent for non-U.S. attorneys.

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ²⁰		
				T ²¹	P ²²	% ²³
Alabama	Yes	No	Proof of educational equivalency required	1	1	100
Alaska	Yes	No	Must be graduates from a law school where principles of English law are taught. Must complete one academic year at an ABA approved law school and one course in federal civil procedure and US constitutional law.	1	0	0
Arizona	Yes	Yes	With a LL.M. or M.C.L. from an ABA approved school applicant can be eligible for the bar examination.	-	-	²⁴

18. Non-US attorneys must check whether the program meets the eligibility requirements for the jurisdiction in which they wish to be licensed.

19. See *Comprehensive Guide to Bar Admissions Requirements, 2000* (ABA), available at <http://www.abanet.org/legaled/publications/compguide2000/cg2000.html>.

20. *2000 Statistics*, *supra* note 9.

21. Taking ("T")

22. Passing ("P")

23. Passing percent (" %")

24. Arizona does not compile statistics based on law degree received.

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ²⁵		
				T ²⁶	P ²⁷	% ²⁸
Arkansas	No	No		0	0	0
California	Yes	Yes	Eligibility is determined on a case-by-case basis, applicant must request determination of legal education equivalency.	56	20	36 ²⁹
Colorado	Yes	No	Law degree must be from a law school located in a common law, English speaking nation, and applicant must be admitted to the bar of the nation from which a first professional law degree was received, and applicant must have "actively and substantially" engaged in the practice of law for at least five of the seven years preceding application.	4	1	25
Connecticut	Yes	Yes	Must obtain an LL.M. degree for post-graduate work acceptable to the committee at a law school approved by the committee, having already obtained a bachelor of laws or equivalent degree at a law school for work acceptable to the committee.	9	4	44

25. 2000 Statistics, *supra* note 9.

26. Taking ("T")

27. Passing ("P")

28. Passing percent (" %")

29. California totals for applicants graduating from law schools outside the United States are approximate.

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ³⁰		
				T ³¹	P ³²	% ³³
Delaware	No	No		0	0	0
District of Columbia	Yes	No	An applicant who graduated from a law school not approved by the American Bar Association will be permitted to take the bar examination only after successfully completing at least twenty-six semester hours of study in the subjects tested in the bar examination in a law school that at the time of such study was approved by the ABA.	-	-	- ³⁴
Florida	No	No		0	0	0
Georgia	No	No		0	0	0
Guam	Yes	No	Those applicants who did not graduate from an ABA accredited law school may apply for a special exemption, however, such exemptions are granted in exceptional circumstances only	0	0	0

30. 2000 Statistics, *supra* note 9.

31. Taking ("T")

32. Passing ("P")

33. Passing percent (" %")

34. Independent data for graduates from non-U.S. law schools is not available as it is merged with statistics of graduates from Non-ABA approved law schools.

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ³⁵		
				T ³⁶	P ³⁷	% ³⁸
Hawaii	Yes	No	Must be admitted to practice before the highest court of a foreign country, where English common law substantially forms the basis of that country's jurisprudence, and where English is the language of instruction and practice in the courts. Must have actively practiced law in such jurisdiction for five of the six years immediately preceding his or her application.	0	0	0
Idaho	No	No		0	0	0
Illinois	No	No		0	0	0
Indiana	No	No		0	0	0
Iowa	No	No		0	0	0
Kansas	No	No		0	0	0
Kentucky	Yes	Yes	The foreign attorney's legal education must be substantially equivalent to the legal education provided by approved law schools located in Kentucky. An additional graduate degree has bearing on boards decision.	0	0	0

35. 2000 Statistics, *supra* note 9.

36. Taking ("T")

37. Passing ("P")

38. Passing percent (" %")

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ³⁹		
				T ⁴⁰	P ⁴¹	% ⁴²
Lousiana	Yes	No	If an applicant is a graduate of a law school that is not located in the United States or its territories, the applicant must submit an application for an equivalency determination.	38	12	31
Maine	Yes	No	Determination of educational equivalency required.	5	2	40
Maryland	Yes	No	May require taking and passing bar examination in another US jurisdiction.	24	13	54
Massa-Chusetts	Yes	Yes	Any applicant who received his/her legal education at a law school located outside a US jurisdiction must have pre-legal education equivalent, in the Board's opinion, to that provided in law schools approved by the ABA. (continued)	0	0	0

39. 2000 Statistics, *supra* note 9.

40. Taking ("T")

41. Passing ("P")

42. Passing percent (" %")

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ⁴³		
				T ⁴⁴	P ⁴⁵	% ⁴⁶
Massachusetts (cont.)			Before permitting such an applicant to take the law examination, the Board in its discretion may, as a condition to such permission, require the applicant to take such further legal studies as the Board may designate at a law school approved by the ABA			
Michigan	No	Yes	If the applicant has obtained an LL.M. degree from an approved law school, the applicant's J.D. or LL.B. need not be from an approved law school.	-	-	⁴⁷
Minnesota	No	No		0	0	0
Mississippi	No	No		0	0	0
Missouri	No	No		5	2	40
Montana	Yes	No		1	1	100
Nebraska	Yes	No	Applicant must attain educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska.	1	1	100

43. 2000 Statistics, *supra* note 9.

44. Taking ("T")

45. Passing ("P")

46. Passing percent (" %")

47. Michigan does not compile data based on law degree received.

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ⁴⁸		
				T ⁴⁹	P ⁵⁰	% ⁵¹
Nevada	Yes	No	A prospective applicant who has received a degree of bachelor of laws or an equivalent law degree from a law school that has not been approved by the ABA must first obtain certification that the prospective applicant has met the qualifications set forth in S.C.R 51.5 ("certification").	6	3	50
New Hampshire	Yes	No		14	0 ⁵²	0
New Jersey	No	No		0	0	0
New Mexico	Yes	No	A non-US foreign graduate must be engaged in the practice of law in another state or states for at least four of the six years immediately preceding the person's application for admission.	0	0	0

48. 2000 Statistics, *supra* note 9.

49. Taking ("T")

50. Passing ("P")

51. Passing percent (" %")

52. Information on seven students in 1998 is not available, seven in 1999 and 2000 did not pass.

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ⁵³		
				T ⁵⁴	P ⁵⁵	% ⁵⁶
New York	Yes	Yes	The applicant will be eligible to cure the deficiency and qualify to take the bar examination upon successful completion of a twenty credit program in professional law subjects, including two basic courses in American law, in an approved law school in the United States. An LL.M. or master's degree from a foreign law school cannot be substituted for the study at an approved U.S. law school.	6983	2882	41
North Carolina	No	No		0	0	0
North Dakota	No	No		0	0	0
Ohio	Yes	No	Determination of educational equivalency is required for all non-US graduates	17	5	29
Oklahoma	No	No		0	0	0
Oregon	Yes	No	The applicant must be admitted to practice before the highest tribunal of a foreign country where the common law of England exists as a basis of its jurisprudence. (continued)	7	3	42

53. 2000 Statistics, *supra* note 9.

54. Taking ("T")

55. Passing ("P")

56. Passing percent (" % ")

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ⁵⁷		
				T ⁵⁸	P ⁵⁹	% ⁶⁰
Oregon (cont.)			The applicant must also prove that he/she is a graduate of a law school equivalent to a law school approved by the ABA.			
Pennsylvania	Yes	Yes	Non-US attorneys who have for a period of five years of the last eight years immediately preceding the date of filing of the application for admission to the bar engaged in the practice of law in a foreign country may apply to sit for the bar examination. In addition they must successfully complete thirty credit hours in an accredited US law school in certain specified subjects.	4	0	0
Puerto Rico	Yes	No		27	7	25
Rhode Island	Yes	Yes	Additional education at an ABA approved law school may be required and the applicant must meet all other requirements for admission.			
South Carolina	Yes	Yes	Applicant should have received a J.D., LL.B., LL.M. or S.J.D degree from a law school approved by the ABA.	0	0	0

57. 2000 Statistics, *supra* note 9.

58. Taking ("T")

59. Passing ("P")

60. Passing percent (" %")

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ⁶¹		
				T ⁶²	P ⁶³	% ⁶⁴
Sout Dakota	No	No		0	0	0
Tennessee	Yes	Yes	Any applicant who received his or her legal education in a foreign country shall satisfy the Board that his or her undergraduate and law school education was substantially equivalent to the requirements of US candidates.	53	13	24
Texas	Yes	Yes	An Attorney holding a valid law license issued by a foreign nation is eligible for admission after passing the bar examination if the attorney has been in active and substantial practice of law in that foreign nation for at least five of the last seven years immediately preceding the filing of the application, holds the equivalent of a J.D. degree, and	21 ⁶⁵	10	47

61. 2000 Statistics, *supra* note 9.

62. Taking ("T")

63. Passing ("P")

64. Passing percent (" % ")

65. 1999 data for Texas is unavailable; the totals here are for 1998 and 2000.

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., SJ.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ⁶⁶		
				T ⁶⁷	P ⁶⁸	% ⁶⁹
Texas (cont.)			demonstrates to the Board that the law of the foreign nation is sufficiently comparable to the law of Texas or holds an L.L.M. from an approved law school. If the foreign attorney has less than five but more than three years of experience the LL.M. is mandatory.			
Utah	Yes	No	Applicants who have graduated from a foreign law school in a country where principles of English common law form the basis for the country's jurisprudence must complete within twenty-four consecutive months, not less than twenty-four semester hours, at an ABA-approved law school, including some specified basic courses.	0	0	0
Vermont	Yes	No	A foreign attorney who has been admitted to the practice of law before the highest court of a foreign nation which is a common law jurisdiction, (continued)	2	2	100

66. 2000 Statistics, *supra* note 9.

67. Taking ("T")

68. Passing ("P")

69. Passing percent (" %")

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., SJ.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ⁷⁰		
				T ⁷¹	P ⁷²	% ⁷³
Vermont (cont.)			the Board, with the approval of the Court, may allow the applicant credit for such study and admission as it deems proper.			
Virginia	Yes	Yes	The applicant shall furnish a certificate from the dean, assistant dean or acting dean of an ABA approved law school in Virginia that his or her foreign legal education, together with his or her approved law school degree, is the equivalent of an LL.B. or a J.D. Degree in the dean's law school.	68	11	16
Washington	Yes	No	To qualify to sit for the bar examination, a non-US attorney must complete three years of the law clerk program.	0	0	0
West Virginia	Yes	No	Non-US attorney must graduate from a law school of a foreign country where the common law of England exists as the basis of its jurisprudence (continued)	0	0	0

70. 2000 Statistics, *supra* note 9.

71. Taking ("T")

72. Passing ("P")

73. Passing percent (" %")

State	Bar Examination Eligibility		Comments	Number		
	Non-U.S. attorney eligible for bar exam without a United States J.D. or LL.B.?	Non-U.S. attorney eligible for bar exam with graduate law degree (LL.M., S.J.D) from ABA-approved school?		Number non-U.S. law school graduates taking and passing bar examinations from 1998-2000 ⁷⁴		
				T ⁷⁵	P ⁷⁶	% ⁷⁷
West Virginia (cont.)			and the applicant must successfully complete study at an ABA-accredited law school, with a minimum of thirty credit hours of basic courses.			
Wisconsin	No	No		0	0	0
Wyoming	No	No		0	0	0

IV. CONCLUSION

Non-U.S. trained attorneys facilitate international transactions and are instrumental in expanding international trade in goods and services. The growing need for international legal services may prompt many states to reexamine their policies towards non-U.S. attorneys. New York has followed the ABA model rule⁷⁸ for FLCs and attracted twice as many FLCs than any other state. New York's liberal policies have also attracted over 95% of all non-U.S. graduates appearing for bar examinations in the United States, and it clearly dominates the globalization of law. FLC licensing has not been a popular option among non-U.S. attorneys. Most non-U.S. attorneys now choose programs that would help them meet the eligibility requirements for specific bar examinations.

74. 2000 Statistics, *supra* note 9.

75. Taking ("T")

76. Passing ("P")

77. Passing percent (" %")

78. See Crossing the Bar, Interview with Peter D. Ehrenhaft, at <http://www.crossingthebar.com/Ehrenhaft.htm>.

THE PLIGHT OF THE STREET CHILDREN OF LATIN AMERICA WHO ARE ADDICTED TO SNIFFING GLUE, AND THE ROLE AND RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS

*Charmaine J. Comprosky**

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I. INTRODUCTION

A great concern for the international community is protecting the rights of children around the world.¹ Currently, there are approximately 100 million abandoned street children in the world.² In Latin American countries there are approximately forty million street children³; and there is an estimation that this number will continue to increase, as poverty becomes more widespread in the urban areas of these countries.⁴ The street children in Latin American countries like Brazil, Guatemala, Honduras, and Columbia learn daily how to survive on the rough streets of

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1. Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE. 153-55 (1997) (discussing the struggle to protect fundamental human rights around the world).

2. Marc D. Seitles, *Effect of the Convention on the Rights of the Child upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala*, 16 IN PUB. INTEREST 159-60 (1998) (examining the many problems associated with street children in Latin America, and discussing international and local governmental responses to this growing social reality).

3. *Id.*

4. *Id.*

the cities.⁵ Their lives often involve sleeping on the cold hard cement, begging for food, stealing from the locals and tourists, selling their bodies for sex, and sniffing glue in order to escape reality.⁶ Many of these children end up on the city streets of these Latin American countries because they have made a choice to fend for themselves in the harsh environment of the streets, as opposed to fight to survive in families torn apart by poverty, alcoholism and abuse.⁷

Thus, part one of this comment will give a general overview of the street children in Latin America; examine some of the problems these street children face on a daily basis; and discuss the children's addiction to sniffing glue. Part two will give a general overview of the involvement of H.B. Fuller Co., an American corporation that has manufactured the glue in its own Central American plants.⁸ Part three will trace the history of international children's rights organizations, and will discuss the primary weaknesses of the Convention on the Rights of the Child;⁹ a body that was established to protect the basic rights of the children.¹⁰ Part four will discuss policies, standards, and regulations established to propose human rights guidelines for transnational corporations to follow.¹¹ Finally, this comment will conclude by offering suggestions on how transnational corporations can create new policies to address children rights violations in the countries where they operate.

II. THE *RESISTOLEROS* AND THE PROBLEMS THEY FACE ON THE STREETS

Children of the streets¹² are children in Latin America who work and live on the streets.¹³ These children have minimal ties to their families, and in most cases no ties at all.¹⁴ The street children are often called

5. *Id.*

6. Craig Kielburger, *The Crusade to Free the Children*, 21 WHITTIER L. REV. 163-72 (1999).

7. *Id.*

8. Paul Jeffrey, *Glue Maker's Image Won't Stick*, MULTINATIONAL MONITOR, Dec. 1995, available at http://www.pangaea.org/street_children/latin/fuller.htm.

9. Kielburger, *supra* note 6, at 165.

10. *Id.*

11. Frey, *supra* note 1, at 153.

12. Seitles, *supra* note 2, at 161.

13. *Id.*

14. *Id.*

Resistoleros,¹⁵ because of their addiction to the glue Resistol that is manufactured in Central America by H.B. Fuller Co.¹⁶ Because these children are virtually on their own, they have to fend for themselves. The age of the children varies from ten to seventeen years old.¹⁷ When the children are younger, they use their innocent appearance to their advantage; thus, the locals and tourists succumb to their begging.¹⁸ However, as the children get older it becomes more difficult to gain sympathy from the locals and tourist; therefore, begging is no longer an option.¹⁹ Consequently, the children then turn to stealing things like wallets, sunglasses and jewelry that they sell to local shop owners in return for food, a place to sleep or glue to inhale.²⁰

The most common reason the children turn to the streets for a home is poverty.²¹ The children are usually born into families that are dysfunctional in many ways.²² For example, the parents are usually unmarried; they have multiple children and often times abuse alcohol.²³ Indeed, the problems the parents in Latin America face are typical of the third world countries; there is a vast disparity between the rich and the poor.²⁴ Therefore, a small percentage of the population is extremely rich, and the vast majority of the population is exceedingly poor.²⁵ Because these countries are under-developed, there are few economic and educational opportunities.²⁶ Thus, the parents themselves are also victims of a vicious economic system, and as a result the children also end up paying a steep price. Consequently, the children turn to the streets because they do not have any other options.²⁷

Life on the streets is tantamount to dodging bullets from an automatic rifle. These young children face threats of physical and sexual abuse,

15. Leyla Kokmen, *Coming Unglued*, CITY BEAT, Feb. 9, 2000, available at <http://www.citypages.com/databank/21/1001/article8414.asp>.

16. *Id.*

17. Seitles, *supra* note 2, at 162.

18. Tamara Rice Lave, *Breaking the Cycle of Despair: Street Children in Guatemala City*, 27 COLUM. HUM. RTS. L. REV., 57-77 (1995) (describing the life of the street children).

19. *Id.*

20. *Id.*

21. Seitles, *supra* note 2, at 161-66.

22. *Id.*

23. *Id.*

24. Rice Lave, *supra* note 18, at 68.

25. *Id.*

26. Seitles, *supra* note 2, at 161.

27. *Id.*

murder, disease, malnutrition, and prostitution.²⁸ First, the children suffer from several health problems because there is no basic health care for them.²⁹ Some examples of the health problems the children experience are respiratory, gastro-intestinal, and dental problems.³⁰ Additionally, since the children do not have regular meals, they suffer from chronic malnutrition that is quite evident in their appearance.³¹ Their height and weight are below average for children of the same age; and they are usually sexually underdeveloped.³² Second, the children are highly susceptible to diseases because of their health, and because sometimes they are victims of sexual abuse.³³

Third, civilians and law enforcement officials frequently mistreat the children.³⁴ The presence of the children on the streets is a menace to the society in general.³⁵ They view the children as a disturbance to the public: they repel the children because of their appearance, and shun them because they are potential thieves.³⁶ For example, they yell or threaten the children, stare at them, and refuse to service them in restaurants and food stalls.³⁷ However, the children suffer the greatest threat from the law enforcement officials.³⁸ For example, they are brutally beaten; assaulted sexually without protection; forced into prostitution; and murdered at the hands of those that are sworn to uphold the law and protect the public as a whole.³⁹

28. *Id.*

29. Rice Lave, *supra* note 18, at 60.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 61 ("Sexually-transmitted diseases (STDs) also pose a serious health problem. A 1991 study of 143 Guatemalan street children conducted by the Center of Orientation, Diagnosis, and Treatment of Sexually Transmitted Diseases and Casa Alianza found that 93% of those studied admitted to having STDs. Of these, 78.3% admitted to having genital herpes, 46.64% gonorrhea, 27.3% papillomatosis, 13.29% vaginal trichomoniasis, 11.7% chancroids, and 69.9% scabies.").

34. Rice Lave, *supra* note 18, at 66-8.

35. *Id.*

36. *Id.*

37. Rice Lave, *supra* note 18, at 66-67.

38. Seittles, *supra* note 2, at 162-64.

39. *Id.* at 163 ("The government supported policy of 'social cleansing' is often carried out in Columbia by military officials and police officers who eliminate groups identified as worthless or dangerous to society, including, but not limited to, street children. In Brazil, police death squads, typically consisting of current, off-duty or former policemen, have systematically killed street children without cause or justification.").

Last, drug abuse is a serious problem for the street children; many are dependent on glue, paint thinner or other types of drugs.⁴⁰ Yet, the majority of the children inhale shoe glue.⁴¹ The glues that they sniff are solvent-based adhesives that contain toxins, like toluene and cyclohexane that can be fatal to the human body.⁴² The children turn to sniffing glue to suppress feelings of hunger, stress, anxiety, isolation, rejection, cold, and pain that comes from living on the streets.⁴³ They also become addicted to the feeling of euphoria that the glue provides.⁴⁴ Although purchasing the glue is legal, inhaling it as a drug over long periods can eventually damage the brain, and the central nervous system.⁴⁵ The short-term effects caused by sniffing the glue are lightheadedness, nausea, and loss of appetite.⁴⁶ Frequently, the children turn to the glue because it is easily accessible and it is quite inexpensive.⁴⁷ Although the drugs comfort the children and give them courage, once they start using abusing them, it is very difficult to stop.⁴⁸

III. THE INVOLVEMENT OF H.B. FULLER CO., AN AMERICAN CORPORATION

H.B. Fuller Co., a Minnesota-based company with manufacturing plants in Central America was one of the main companies to sell shoemaker's glue containing toluene in Latin America.⁴⁹ H.B. Fuller Co., decided to stop selling solvent-based footwear adhesives in Latin America in November of 1999 amidst controversy after human rights group campaigned against them and continually attacked them in the media.⁵⁰ However, H.B. Fuller had long insisted that its company was not responsible for product abuse, because it designed their glue for shoes, and sold it to legitimate manufacturers.⁵¹ Thus, H.B. Fuller's decision to pull

40. *Id.*

41. Rice Lave, *supra* note 18, at 64-66.

42. Kokmen, *supra* note 15.

43. *Id.*

44. *Id.*

45. *Id.*

46. Rice Lave, *supra* note 18, at 64-66.

47. *Id.*

48. Paul Jeffrey, *Firm Resists Tighter Control on Toxic Glue*, NATIONAL CATHOLIC REPORTER, Mar. 31, 1995, available at http://www.pangaea.org/street_children/latin/ncr.htm.

49. *Id.*

50. Kokmen, *supra* note 15.

51. *Id.*

out of the Latin American market has come after years of strife and fights by advocacy groups for the street children.⁵²

In the 1980s, activists in Central America demanded the addition of oil of mustard to toluene-based glues to deter first-time users from trying the glue and to discourage regular users.⁵³ The activists wanted the manufacturers to follow the lead of another U.S.-based company, Testor Corporation, that added mustard oil to model airplane glue in 1968.⁵⁴ After the addition of mustard oil, the glue was difficult to inhale; consequently, the abuse rate declined.⁵⁵ Although the cost of this process was negligible, there was a reduction in sales for Testor Corporation.⁵⁶

Following this example would have required the glue manufacturers to address the abuse problem during the manufacturing stage of the product. The activists viewed this as a very practical approach and insisted on this implementation; however, H.B. Fuller and other manufacturers refused to comply.⁵⁷ In the wake of the controversy, the Honduran Congress passed a law that required the addition of mustard oil to toluene-based products.⁵⁸ H.B. Fuller retaliated by inundating shoemakers with claims that mustard oil would be dangerous for their health; and started to lobby incessantly against the new law.⁵⁹ Therefore, after H.B. Fuller's attacks, the Honduran Congress succumbed, and recommended that toluene products need not contain any mustard oil at all.⁶⁰

Subsequently, the situation in Honduras became a hot subject with children's activists in the United States. The United States activists began campaigning strategically in order to compel H.B. Fuller to switch to less-toxic, water-based glues or add mustard oil to the formula.⁶¹ In 1992, after learning that NBC "Dateline" would begin filming an investigation into H.B. Fuller's role in the abuse of the glue, H.B. Fuller vowed to stop

52. *Id.*

53. Jeffrey, *supra* note 8.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Jeffrey, *supra* note 8, at http://www.pangaea.org/street_children/latin/fuller.htm. ("While observing street kids snatch watches and handbags on the streets of Tegucigalpa, Hector Palacios, a street educator for Casa Alianza, the Latin American program of New-York-based Covenant House, told NCR, "Look at their eyes or smell their clothes. It's glue that gives them the bravery to do that.").

59. *Id.*

60. *Id.*

61. *Id.*

producing solvents in known areas where abuse was rampant.⁶² Unfortunately, after the media attention had moved on, H.B. Fuller continued to sell toluene-based glue in the region.⁶³ Although it removed the smaller containers of glue from store shelves in Honduras and Guatemala, industrial sales and other retail distribution continued.⁶⁴

In 1993, activists in Central America still insisted that H.B. Fuller had not kept its promises because the street children still had access to toluene-based glue.⁶⁵ H.B. Fuller disagreed because it added warning labels to retail cans in Nicaragua, that advised against selling the product to minors.⁶⁶ However, the store clerks seemed to ignore the labels, and still sold it to the children.⁶⁷ Furthermore, H.B. Fuller insisted that it had spent a great deal of time researching how to make solvent-based glues harder for children to acquire, and more repugnant to smell.⁶⁸ H.B. Fuller disagreed with the addition of mustard oil because they claimed it was a dangerous carcinogen.⁶⁹ Moreover, it had developed water-based alternatives to the solvents, but conceded that the shoemakers would not be able to afford the necessary technology in order to incorporate the new process.⁷⁰

In March of 1994, H.B. Fuller introduced a new glue formula in Costa Rican newspaper advertisements that claimed it would substitute cyclohexane for toluene, and began introducing the new formula in Latin America.⁷¹ H.B. Fuller asserted that this new formula would resolve the abuse problem because it had a repugnant smell, so it would not be as sweet smelling as toluene.⁷² However, cyclohexane is also a hazardous toxin, so H.B. Fuller's claim that the new formula was less dangerous was rather misleading.⁷³

62. *Id.*

63. Jeffrey, *supra* note 48.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Kokmen, *supra* note 15.

69. Jeffrey, *supra* note 48.

70. Kokmen, *supra* note 15.

71. *Id.*

72. *Id.*

73. Jeffrey, *supra* note 48 ("The suggestion that cyclohexane is less dangerous is misleading. A hydrocarbon solvent like toluene, cyclohexane also makes the EPA's Superfund list of hazardous toxins. "The difference between toluene and cyclohexane is like the difference between a .44 magnum and a .357 magnum . . .").

In 1995, Julia Polanco a Guatemalan citizen filed a wrongful death lawsuit against H.B. Fuller in a United States District Court in Dallas, Texas.⁷⁴ The suit alleged that H.B. Fuller contributed to the death of Julia Polanco's son, Joel Linares, who died of kidney failure in 1993 in Guatemala.⁷⁵ Polanco plead that H.B. Fuller contributed to her son's death by designing, manufacturing, and marketing a product that they knew children abused; yet they continued to sell it without taking any precautionary steps to ensure that the children would not be able to access the product.⁷⁶ Thereafter, Polanco's attorney filed a subsequent suit in Minnesota, and then withdrew the Texas lawsuit once they stopped the statute of limitations from running.⁷⁷ In *Polanco v. H.B. Fuller*,⁷⁸ the Minnesota federal court dismissed the suit on two grounds: lack of diversity, and forum non conveniens.⁷⁹ First, concerning lack of diversity, the court stated that H.B. Fuller was not a monolithic entity because there were three distinct companies, Fuller-U.S., Kativo, a Panamanian company, and Fuller-Guatemala.⁸⁰ Because the physical manufacturing of the glue was by Fuller-Guatemala, an indispensable party that Fuller-U.S. sought to join, Guatemalan citizens would be on both sides of the case, and therefore diversity was destroyed.⁸¹

Second, concerning forum non conveniens, the court reasoned that even if the jurisdictional problems were resolved, all the necessary evidence would be in Guatemala so it would be more appropriate to try the case in Guatemala.⁸² Thus, Polanco had no other choice but to try the case in Guatemala. However, Guatemala has a one-year statute of limitations for filing cases; Polanco's son had died three years before the filing of the Minnesota lawsuit.⁸³

On November 30, 1999, H.B. Fuller finally decided to stop selling the solvent-based glue in Latin America.⁸⁴ It decided to concentrate on

74. Jeffrey, *supra* note 8.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Polanco v. H.B. Fuller Co.* 941 F. Supp. 1512 (D. Minn. 1996).

79. *Id.* at 1514-15.

80. *Id.* ("Fuller-U.S. owns 95% of Kativo, a Panamanian corporation. Kativo, directly, and through its own subsidiary, in turn owns all the stock of Fuller-Guatemala, a Guatemalan corporation.")

81. *Id.* at 1515.

82. *Id.*

83. *Polanco*, 941 F. Supp. at 1515.

84. Kokmen, *supra* note 15.

researching, and developing water-based glue as opposed to solvent-based glue because they can offset the cost of the new technology to larger industrial customers.⁸⁵

IV. THE CHILDREN'S RIGHTS

The first children's rights movement began in early 1920s.⁸⁶ The movement was an indirect response to the industrialization period, and a world war that exposed children to various atrocities.⁸⁷ In 1959, the United Nations General Assembly passed the Declaration of Rights of the Child to govern the rights of children after the Second World War when children suffered inhumane deaths.⁸⁸ However, this was not a binding instrument on the nations; it urged the nations to comply with the Declaration in hopes of protecting the children.⁸⁹ In 1979, Poland proposed a treaty that would be binding on the member countries of the United Nations in order to protect children in these countries.⁹⁰ This was the opportune moment for a treaty that sought to incorporate all the established principles of the previous Declaration; and include other human rights treaties because the world recognized 1979 as the International Year of the Child.⁹¹ Thereafter, in 1989 a sector of the United Nations completed the Convention on the Rights of the Child.⁹² The Convention had taken ten years to draft, and it addressed the concerns, problems and issues that involved children throughout the world.⁹³

Thus, by the end of 1996, 176 countries had accepted the Convention on the Rights of the Child, and agreed to be bound by its principles.⁹⁴ This was a milestone for children's rights because it demonstrated that the United Nations had finally agreed to institutionalize the concept of children's rights in an international forum.⁹⁵ Moreover, the Convention brought together leaders from all over the world to incorporate the full

85. *Id.*

86. Seitles, *supra* note 2, at 165.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Seitles, *supra* note 2, at 165.

92. *Id.* at 165-66.

93. *Id.*

94. *Id.* at 166.

95. *Id.*

range of human rights for children: civil, political, economical and cultural rights.⁹⁶

The Convention on the Rights of the Child formulates three basic principles that include fundamental rights that are necessary to protect children around the world.⁹⁷ First, all children should enjoy their rights without discrimination, prejudice, or exceptions of any kind.⁹⁸ Second, the best interest of the child must be considered in all actions concerning children, 'regardless of whether it involves public or private actions.'⁹⁹ Third, children should have the opportunity to formulate ideas and express their own opinions, and the public should acknowledge these opinions.¹⁰⁰ Additionally, the Convention also includes substantive articles¹⁰¹ that recognize civil rights, a right to life, freedom for children, and offers special protection to certain groups of children such as refugees, orphans and disabled children.¹⁰²

There is no definitive enforcement mechanism for making sure that the provisions of the Convention on the Rights of the Child are incorporated. There is a presumption that the ratifying nations will incorporate the provisions into the respective nations' laws; however, the aim of the Convention is to assist the nations that have not ratified the document to interpret the Convention's laws.¹⁰³ Consequently, the Convention instituted a permanent international forum to address important issues, and discuss potential methods of resolution.¹⁰⁴ The forum includes an elected Committee on the Rights of the Child. The elected Committee reviews progress reports from nations that have ratified the document to ensure they comply with the Convention.¹⁰⁵ The Committee can request

96. Kielburger, *supra* note 6, at 166.

97. Seitles, *supra* note 2, at 167.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* ("The substantive articles of the Convention recognize civil rights and freedoms for children, such as the right to a name, a nationality, freedom of expression, privacy and a right to life. Developmental rights include assurances of an adequate standard of living, access to health services, right to education, standards of parental responsibility, State assistance for children deprived of a family environment, and the right to be free from all forms of abuse and neglect. Protective rights in the Convention guard children against economic and sexual exploitation, cruel tortuous treatment, arbitrary separation from their families, and abuses in the criminal justice system.")

102. Seitles, *supra* note 2, at 168.

103. *Id.*

104. *Id.*

105. *Id.* at 168-73.

additional documentation from the reporting nations; and will prepare and submit a report of its own findings.¹⁰⁶

The Convention on the Rights of the Child has made promises to children that it has a difficult task of keeping. A basic principle of the Convention states that children are entitled to enjoy their rights without discrimination or distinction.¹⁰⁷ However, there is no enforcement mechanism to guarantee this basic principle.¹⁰⁸ Therefore, on the surface, this Convention seems to be a panacea but in reality, it lacks any substance. First, the Convention has an elected committee that reviews progress reports from ratifying nations, but the nations are not obligated to submit this report.¹⁰⁹ Thus, nations like Brazil, Guatemala, Colombia, and Honduras where children live on the streets and endure abuse everyday may decline to submit this report. However, the Convention does not address this because there is an assumption that each ratifying nation will comply. If the country does supply the report, there is no official checkpoint to verify that it is accurate; therefore, there is the possibility that countries may misrepresent its problems or exaggerate its successes.¹¹⁰

Second, although the Committee reviews and can request additional documents from the countries, there are no enforcement mechanisms at the international level to ensure the rights guaranteed by the Convention.¹¹¹ Simply stated, the Convention does not have the power to guarantee that children on the streets in Latin America will be able to enjoy a basic right that it purports to guarantee.

Third, the Committee is not authorized to accept any petitions that allege violations of the Convention from the States Parties or individuals that may seek to file a grievance.¹¹² In other words, there is no true dispute resolution at the international level for parties that may have a conflict about the rights of the Convention. Simply stated, street children who are brutally beaten, murdered or forced into prostitution at the hands of law enforcement officials while the government looks the other way cannot file a petition with the Committee. Furthermore, street children cannot petition to have corporations conduct their transactions so that the corporations will comply with the Convention's principles. Indeed, there seems to be no protection for the street children under the Convention.

106. *Id.*

107. Seitles, *supra* note 2, at 168-73.

108. *Id.* at 172-73.

109. *Id.*

110. *Id.*

111. *Id.*

112. Seitles, *supra* note 2 at 172-73.

Fourth, poorer nations like the countries in Latin America may not need to comply with the Convention because of their economic conditions.¹¹³ Therefore, a country's resources could dictate the appropriate measures that it should undertake.¹¹⁴ Consequently, "it may result in an unfortunate escape clause for the same countries where implementation is most necessary."¹¹⁵ Certainly this is an anomaly; the countries where children tend to experience the most suffering are usually the countries that have the fewest resources, and are struggling economically. This is the classic case of the street children that barely exist in Latin America. As previously stated, poverty is a mitigating factor that drives these children to the streets.

Fifth, the Convention ensures the right to life of each child.¹¹⁶ Therefore, it is the responsibility of each country to see to the welfare of its children.¹¹⁷ The welfare of the child should encompass the necessities for survival. Thus, each child should have a home, food and clothing.¹¹⁸ The street children do not have access to these basic necessities, and they are left to fend for themselves while struggling to ward off evil forces that threaten their lives; although, the Convention ensures that the ratifying countries will take steps to prolong the life of its children.¹¹⁹ In order to prolong the life of the children, the street children should have a fair chance at survival. However, survival for the street children requires that they are safe from harm, and that society meets their basic needs on a daily basis. On the contrary, Columbia's policy of "social cleansing" has caused the death of one street child every four hours.¹²⁰ In addition, in Guatemala, National Police Officers and other government security force members were incriminated in many assaults against street children that resulted in fourteen murders over a period of eighteen months.¹²¹ Consequently, Guatemala has been under international scrutiny, but it has been difficult to prove that the government allowed this to transpire

113. *Id.*

114. *Id.* at 172-74.

115. *Id.*

116. *Id.* at 174-78.

117. Seitles, *supra* note 2, at 174-78.

118. *Id.* ("Assuring an adequate standard of living for all children is particularly relevant for street children. Article 27 of the Convention on the Rights of the Child addresses this issues and obliges States Parties to ensure that children are provided with food, clothing, and housing according to the financial resources available and the norms of the particular culture.")

119. *Id.*

120. *Id.* at 176-78.

121. *Id.*

although there is evidence that the local authorities approved of the killings.¹²²

Sixth, the Convention on the Rights of the Child also contains a specific reference to the illegal use of narcotic drugs, and psychotropic substances because drug abuse is prevalent amongst children.¹²³ Once again, the countries in Latin America have failed the children when it comes to drug abuse. The countries had done very little to stop the sale of the glue until the lawsuit against H.B. Fuller was filed.¹²⁴ Furthermore, the Convention requires that children have access to rehabilitation and a chance to reintegrate into society, yet there are no governmental programs in Latin America for children that have serious addiction problems.¹²⁵ In fact, Casa Alianza, an independent, non-profit organization, is the only entity that offers a drug rehabilitation program to children with extreme addiction problems in Guatemala, Honduras, Mexico and Nicaragua.¹²⁶

Thus, the Convention on the Rights of the Child guarantees that these street children have some fundamental rights, but there is no real enforcement mechanism to ensure that the member countries will comply with the articles of the Convention. Therefore, there is no real protection for these street children under a treaty that was established for their benefit.

V. THE LEGAL AND ETHICAL RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS

The United Nations has been the primary entity in promoting and protecting human rights at the international level.¹²⁷ Throughout history, corporations have rarely gotten involved in the protection of human rights issues.¹²⁸ However, the transnational corporations are being scrutinized for possible violation of human rights issues, and some of these corporations have created their own policies in direct response to human rights violations that occur in the countries where they do business.¹²⁹

Originally, international bodies like the United Nations have enacted schemes for regulating the activities of transnational corporations in the

122. Seittles, *supra* note 2, at 176-78.

123. *Id.* at 180-84.

124. *Id.*

125. *Id.*

126. Lave, *supra* note 18, at 102.

127. Frey, *supra* note 1, at 154-60.

128. *Id.*

129. *Id.*

countries where they conduct business. Initially, the goal was solely to regulate economic issues and business practices.¹³⁰ In 1974, the United Nations called for a code of conduct for transnational corporations that would prevent them from exploiting the countries where they operate and established a Commission with members from forty-eight states in order to formulate a code of conduct for transnational corporations.¹³¹ The formulation of the code started in 1977, continued through 1990, and required transnational corporations to respect the social and cultural objectives, human rights principles, and the values and traditions of the people in the countries where they do business.¹³² Also, transnational corporations should not discriminate on the basis of race, color, sex, religion, language, social, national and ethnic origin or political or other opinion.¹³³

Individual countries have also taken steps to regulate transnational corporations. For example, the United States has also regulated the activities of transnational corporations.¹³⁴ In 1930, the United States forbade the importation of any goods that were produced by convict labor.¹³⁵ In the 1970s, the United States also instituted policies that addressed economic issues regarding international commerce.¹³⁶ However, none of the policies was instituted specifically for protecting human rights issues; but the United States has used economic sanctions as a tool to punish governments when they violated human rights policies.¹³⁷ The legislative body of the United States enacted the Apartheid Act in 1986 that prevented American companies from doing business in South Africa because of the South African government policies; in 1995, the Burma Freedom and Democracy Act forbid investments that supported the

130. *Id.* ("Many of the early U.N. actions to formulate policies for TNCs focused on regulating restrictive business practices. The newly independent states in the U.N. formed the Group of 77 (G-77). With support of the then-socialist East Bloc states, the G-77 worked within the United Nations to control the ability of TNCs to threaten the sovereignty of host states through the evasion of national regulation and taxation, the distortion of market conditions, or the introduction of alien cultural values.")

131. *Id.* ("Capital-exporting states intended to use the code as a means of protecting the TNCs against discriminatory treatment; capital-importing countries wanted to use it as a means of subjecting the activities of TNCs to greater regulation.")

132. Frey, *supra* note 1, at 166-68.

133. *Id.*

134. *Id.* at 168-71.

135. *Id.*

136. *Id.*

137. Frey, *supra* note 1, at 169. ("Despite its willingness to regulate business activities in foreign countries, the U.S. government has made relatively few successful legislative and executive efforts to specifically regulate TNCs on human rights issues.")

Burmese military government.¹³⁸ Additionally, in 1989 the United States Senate also formulated a code of conduct for American corporations that did business in the Soviet Union; and then in 1991 a voluntary code of conduct was also designed for American companies doing business in China.¹³⁹ Then, a United States senator introduced the Child Labor Deterrence Act that would prohibit the importation of any goods that were produced by children under the age of fifteen.¹⁴⁰

Private groups have also taken the initiative to propose standards for corporations that do business in countries with human rights violations.¹⁴¹ Two well-known principles are the Sullivan Principles¹⁴² and the MacBride Principles;¹⁴³ these established principles play a significant role in promoting human rights.¹⁴⁴ The private groups monitor corporations that conduct business in countries that have serious human rights violations.¹⁴⁵

Last, some major companies that identify themselves as transnational corporations have voluntarily executed internal policies and procedures that specifically deal with human rights in the countries where they conduct business.¹⁴⁶ These internal policies and procedures encompass vendor standards,¹⁴⁷ standards for supporting civil and political rights¹⁴⁸ and

138. *Id.* at 169. ("The bill mandates that the U.S. Government withhold support for loans to Burma from international financial institutions, prevent direct assistance to SLORC (State Law and Order Restoration Council) and exclude the members of SLORC from the United States.")

139. *Id.*

140. *Id.*

141. *Id.* at 174-77.

142. Frey, *supra* note 1, at 174-77. ("Sullivan's code of conduct included six principles which placed businesses in the position of direct advocates of non-discrimination in the workplace and the community during the period of apartheid in South Africa. During its height of effectiveness, the Sullivan code had more than 125 companies as signatories, including giants such as Exxon, Mobil, IBM, Citicorp and Merck. The Sullivan Principles required not only non-discrimination in the workplace, but community investments to increase opportunities for oppressed racial groups.")

143. *Id.* ("[A] U.S.-based group of advocates drafted its own code of conduct to encourage TNCs to combat the legacy of discrimination and strife in Northern Ireland....In addition to promoting hiring, training, and advancement on a non-sectarian basis, the principles call for a ban on 'provocative, sectarian, or political emblems from the workplace,' and adequate security to protect employees from sectarian violence.")

144. *Id.* at 174.

145. *Id.*

146. *Id.* at 177-80.

147. Frey, *supra* note 1, at 177-80. ("Several companies have enacted minimum standards regarding conditions of employment for their workers and those of their business partners. The common features of these standards include a prohibition on forced, convict or child labor.")

148. *Id.* ("Some companies go beyond labor issues to expressly commit themselves to protecting political rights, including freedom of association, freedom from compulsory political

standards for investments.¹⁴⁹ Being recognized as a transnational corporation can be very advantageous for companies on an international basis because it shows their commitment to human rights concerns.¹⁵⁰ Moreover, these transnational corporations believe economic advantage can be used as a sword to persuade countries with human rights violations to conform to the correct standards.¹⁵¹

All of the above bodies have created policies, rules, regulations or guidelines for transnational corporations to comply with, however children rights violations still continue in places like Latin America. The codes of conduct do give some guidelines for corporations to follow, but they are not binding on them.¹⁵² Whether a corporation responds to the human rights violations depends on many factors.¹⁵³ For example, a company's benevolence may decide if it continues to do business in a place where there is egregious violations.¹⁵⁴ Additionally, if the corporation's philosophy includes strong moral and ethical practices, and the corporation has made this a part of its business culture, then that corporation may take proactive steps to prevent violations.¹⁵⁵ Nevertheless, a corporation may not choose to respond because it is driven by financial aspirations and that may overshadow any ethical norms.¹⁵⁶ Consequently, the code of conduct for transnational corporations maybe a starting point in the right direction, and can be improved to benefit children who continue to suffer in places like Latin America.

VI. CONCLUSION

The plight of the street children of Latin America is an example of a problem compounded by a corporation continuing to sell an addictive product even though it realized the children were addicted to that particular product. However, companies are morally and ethically responsible to respond to human rights violations especially when the company itself may be a contributing factor to a part of the problem. Therefore, as a whole,

indoctrination, and freedom from labor as a punishment for holding or for peacefully expressing political views.")

149. *Id.* ("A few companies have publicly stated bottom line principles guiding decisions about whether or not to do business in a country with significant human rights problems.")

150. *Id.*

151. *Id.*

152. Frey, *supra* note 1, at 180-82.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 180.

transnational corporations must act to prevent or to correct violations that occur in this manner.

First, transnational corporations must abide by the same code of ethics in foreign nations, as they would abide by at home. Since the world is a global marketplace, these corporations must do more than just reap the economic benefits of doing business internationally. They must also bear the burden of ensuring fundamental human rights, especially ones concerning children who can not fend for themselves. On a whole, these corporations must take into account the interest of all the parties who may be affected by their actions. This is a logical approach because people pay attention to the way these corporate entities conduct themselves. Furthermore, these corporations may have to face negative repercussions if they are perceived negatively. They could face being boycotted on the home front, and the devaluation of their stocks.

Second, transnational corporations should not passively allow children's rights violations. Whenever one of these corporations are violating a policy or contributing to the violation in any manner, the other corporations should band together to put pressure on the violator's ability to conduct business. This could involve refusing to supply materials that are necessary to complete production, and impeding shipment or delivery. Therefore, all of these transnational corporations should actively work together to uphold moral and ethical principles of human rights. Issues that involve children should be a priority for these corporations. If necessary, transnational corporations should also put pressure on governments that violate children's rights. This could include a refusal to ship necessary products until there is evidence of strategies to correct the violation. In the case of street children that are being murdered, the perpetrators must be prosecuted and there must be severe punishment for those that attempt to abuse the children.

Third, transnational corporations should be required to provide retribution when they have violated a human rights policy. When a company agrees to provide retribution, the public should not perceive the corporation as expressing wrongdoing, but should applaud them for actively working to correct a situation. This may provide an incentive for a company to clean up its negative activities. For example, in the case of the Latin American street children, there should be monies provided for rehabilitation. Rehabilitation should include curing the drug addiction and providing facilities for the children to survive daily. If possible, efforts should be made to reunite them with their families if there are strong family ties. Funding should also be provided to help get the children off the streets. Although the children's underlying problems stem from the

economic problems in these countries, this would possibly push the governments to prevent the flight from their parents.

To conclude, the street children of Latin America are victims who have suffered and continue to suffer at the hands of an ineffective government and a corporation. Although the Convention on the Rights of the Child was created to ensure that children around the world would be protected, there is no enforcement mechanism to guarantee that countries will comply with the basic principles of the Convention. Therefore, because the world is fast becoming a global economy, transnational corporations are now being scrutinized for possible human rights violations that occur in the countries where they operate or because the corporations themselves are also perpetrators of the violations. Therefore, independent bodies and the transnational corporations themselves have also created policies in direct response to these violations. This maybe a step in the right direction to addressing human rights violation in the global marketplace. Thus, transnational corporations need to demonstrate that they are conducting business in a moral and ethical way by taking additional steps to prevent the victimization of children, and by employing positive actions to correct any violation that does occur.

TECHNOLOGICAL ADVANCEMENTS AND THE EVOLUTION OF TERRORISM

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I. INTRODUCTION

Terrorism is one of the most heinous crimes against humanity and human rights. It takes thousands of lives for no reason other than political publicity. There is not a single religion in the world that condones this behavior and yet its impact seems to grow with every passing year. Human rights crimes are seen as crimes against mankind and there are some that see terrorism in the same way, a common law offense against mankind. When one thinks of a terrorist, typically a Middle Eastern Arab

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man comes to mind, as seen when the authorities were trying to find suspects for both the New York City World Trade Center and Oklahoma City bombings. However, American society was shocked to learn that anyone could be a terrorist. The Oklahoma City bombing was masterminded not by a Middle Eastern Arab but a white American citizen. Besides being identified as an Arab, many terrorists have been viewed as "madmen or fanatics" with whom one cannot negotiate.¹ Thus, in order to rationalize their behavior they are described as psychotic or even psychosociological.² But, if we cannot even profile a terrorist how are we expected to combat terrorism?

The remainder of this paper will attempt to answer that question by detailing how the world is addressing the problem of terrorism and working as a global entity to eliminate it. Being that terrorism has evolved over time, this paper will focus on pre-computer advancements and post-computer advancements in a comparative fashion. Part I will lay out the issues that will be addressed in the remainder of the paper. Part II will focus on terrorism and the evolution it has made over time. Included in this part, is a section dealing with definitional information so that everyone is aware of the problem and understands how it is being addressed and categorized. The next section profiles terrorism from the 1970's and contrasts it with more modern terrorism. After that is a description of statistics outlining the results of various terrorist attacks over the years along with agency profiles. Next, is a section providing quotes from various world leaders and nations in general pledging their commitment to the eradication of terrorism. Following this is a national response to terrorism, focusing mainly on laws and conventions from around the world that have been enacted as a way to deal with the international problem of terrorism. And finally, the last section in Part II will focus on new threats to the world community in the face of terrorism.

Part III of this paper will focus on cyberterrorism, the newest form of terrorism to have evolved. The first section in this part provides the reader with a brief explanation of cyberterrorism along with numerous definitions that have been used when describing cybercrime and cyberterrorism in general. The following section is one of the reasons for the growth of cyberterrorism. A section on the impact of cyberterrorism and the coverage that it is able to maintain as a result of the advancements in technology is next. After this section there will be some descriptions of

1. TERRORISM AND INTERNATIONAL LAW 5 (Roselyn Higgins and Maurice Flory eds. 1997). This viewpoint is contrasted in a subsequent footnote that indicates that yesterday's terrorists were ones' that the authorities could in fact negotiate with.

2. *Id.*

the new weapons used in cyberterrorism and the threat that they cause. Lastly, there is a section detailing what is being done to deal with cyberterrorism followed by critics who do not see cyberterrorism as an issue that should be addressed at all right now. And finally, Part IV of this paper will include conclusions reached.

II. TERRORISM

A. Definitional Explanations

Terrorism is a form of political behavior³ and has been defined as “the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet political objectives of the perpetrators.”⁴ It differs from revolutionary action in that it does not seek to overthrow the government but rather strives for short-term intimidation.⁵ Normally, the terrorist act demonstrates the fragility of a certain social or political order by attacking the State, its symbols or representatives of power.⁶ Thus, a terrorist act seems to be an “act of violence committed by an individual with a political, ideological, social, or even religious aim.”⁷

According to the Immigration and Naturalization Service (INS), a terrorist organization is defined as “one whose leadership, or whose members, with the knowledge, approval, or acquiescence of the leadership, have taken part in terrorist activities.”⁸ There are three requirements that the Secretary of State can use to identify a terrorist organization. They are: 1) if the organization is a foreign organization, 2) if the organization engages in terrorist activities, and 3) if the organization threatens the security of United States nationals or the national security of the United States.⁹ As of December 2000, there were twenty nine such terrorist organizations listed.¹⁰ A terrorist organization designation can be

3. *Id.* at 4.

4. Yassin El-Ayouty, *International Terrorism Under the Law*, 5 ILSA J. INT'L & COMP. L. 485 (1999).

5. Higgins, *supra* note 1, at 4.

6. *Id.* at 150 (acknowledging that through their actions many terrorists are able to address the nation and lay down conditions or espouse their beliefs).

7. *Id.*

8. Immigration Law Service ch. 14 Inadmissibility, Deportation, and Removal under IIRAIRA. I. Grounds for Denial of Admission and of Visas; Exceptions D. Security and Related Grounds 2. Terrorist Activities § 14:76 - Terrorist Organization.

9. *Id.* (defining “national security” as the “national defense, foreign relations, or economic interests of the United States”).

10. *Id.* (listing the organizations in alphabetical order as follows: Abu Nidal Organization, Abu Sayyaf Group, al Qa'ida, Armed Islamic Group, Aum Shinrikyo, Basque Fatherland and Liberty, Gama'a al-Islamiyya, Hamas, Harakat ul-Mujahideen, Hezbollah, Islamic Movement of

set aside, however by the United States Court of Appeals for the District of Columbia.¹¹ However, the court cannot set aside a designation based on the Secretary of State's determination that the organization threatens the security of United States nationals or the national security of the United States.¹²

B. Contrasting Decades of Terrorism

In the 1970's and 1980's terrorism consisted of the taking of hostages, plane hijacking and destruction, and attacks by bombs, mostly car bombs.¹³ The terrorists themselves were small bands of nationals with identifiable goals and usually had to do with the denial of the right of self-determination or resistance to physical and oppressive foreign occupation.¹⁴ Even if the organization took on a religious name the terrorism itself was seen as secular in nature.¹⁵ Old terrorist leaders were ones you could negotiate with, accept a cease-fire, exchange for hostages or the return of the remains of dead soldiers in exchange for terrorist prisoners.¹⁶ This old terror provided a contract like environment between the state and the terrorist organization.¹⁷ In many instances, these terrorists were seen as

Uzbekistan*, Japanese Red Army*, al-Jihad, Kach*, Kahane Chai, Kurdistan Worker's Party, Liberation Tigers of Tamil Eelam, Mujahedin-e Khalq Organization, National Liberation Army, Palestine Islamic Jihad-Shaqaqi Faction, Palestine Liberation Front B Abu Abbas Faction, Popular Front for the Liberation of Palestine, Popular Front for the Liberation of Palestine B General Command, Revolutionary Armed Forces of Colombia, Revolutionary Organization 17 November, Revolutionary People's Liberation Party / Front, Revolutionary People's Struggle*, Shining Path, and Tupac Amaru Revolutionary* Movement.) * As of October 5, 2001, the organizations indicated with an * were dropped from the list, while the Revolutionary Nuclei was added to the list. *State Dept. Redesignates 25 Groups as Foreign Terrorist Organizations*, INTERPRETER RELEASES, Oct. 8, 2001.

11. *Id.* (explaining that the designation can be set aside based on five factors: 1) if the court finds the designation "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) contrary to constitutional right, power, privilege, or immunity; 3) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; 4) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under I.N.A.'s 219(b)(2) [8 U.S.C.A. § 1189(b)(2)], not in accordance with the procedures required by law").

12. *Id.* (noting however that the court can review the fact that the organization is "foreign" or "engaged in terrorist activities").

13. El-Ayouty, *supra* note 4, at 485.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 486 (noting that this relationship provided for some form of compromise between the parties).

"freedom fighters" and once peace returned many were elevated to diplomatic posts or other political positions.¹⁸

This terrorism, however, is not today's terrorism. Today, there are no borders, no fronts, no clear ideology, no state, no government, and no physical structure.¹⁹ Rockets are no longer the weapon of choice, today it is either chemical, biological, or even nuclear weapons which can cause mass terror and sweeping destruction.²⁰ This also leaves open the notion of cyber warfare against computers and telecommunication networks.²¹ As means of communication have evolved and expanded terrorists can see the "fruits of their labor" in seconds as images are broadcast throughout the world.²² Today's terrorists are also interested in pseudo-religious and transcontinental objectives.²³ Taken as a whole, this all looks depressing but what is worse is that many of today's terrorists were "trained" by the United States.²⁴

C. Statistics

A misconception about terrorists is that they are on suicide missions. According to Center Intelligence Agency (CIA) statistics, 62% of terrorists actually have a back up plan or escape route if things go wrong.²⁵ Another way to protect their life is to engage in actions like placing a bomb or an assassination instead of hijacking an airliner or seizing official buildings.²⁶ Terrorists even go as far as analyzing the likelihood of confronting the authorities before they engage in certain acts.²⁷ Once terrorists have received the attention of the authorities they may even appear unselfish

18. El-Ayouty, *supra* note 4.

19. *Id.* at 486 (recognizing that today's terrorists have globalized, there is no longer an organizational chart, or fixed bases).

20. *Id.*

21. *Id.*

22. Higgins, *supra* note 1, at 5.

23. El-Ayouty, *supra* note 4, at 486.

24. *Id.* (noting that individuals like Saddam Hussein and Osama bin Laden were "greenhoused" and "cocooned by the United States and/or allies of the United States like Pakistan, Saudi Arabia, Egypt, and Afghanistan when it was under Soviet occupation" as a way to prevent communist expansion into Afghanistan).

25. Higgins, *supra* note 1, at 5 (illustrating that terrorists are not interested in losing their life as a result of their actions).

26. *Id.*

27. *Id.* at 6 (noting that other factors taken into consideration consist of risk and time).

because when they plead their case it is not personal; rather it is addressing something they believe should be changed.²⁸

Terrorism is a concept that has evolved along with society.²⁹ According to the United States Department of State, between 1968 and 1982, there were almost 8,000 terrorist attacks.³⁰ However, 1985 was the record year for international terrorism with 800 deaths and 1,200 injuries.³¹ In the mid- 1990's there were on average two terrorist attacks a day, which varies between 600 and 850 per year.³² Another source, the North Atlantic Treaty Organization (NATO) Assembly's Assessment of International Terrorism in 1987, reported that between the years of 1973 and 1983, 5,175 terrorist attacks were conducted killing 3,689 individuals while injuring 7,791 others.³³ In 1997, 221 people died and another 690 were injured the entire year, however the following year these statistics were blown out of the water in a single one day, August 7, 1998.³⁴

D. A Global Response

Leaders and nations from around the world have all spoken out against terrorism. In 1998, United Nations Secretary-General Kofi Annan was quoted as saying, "Terrorism is a global menace, which clearly calls for global action. Individual actions by Member States, whether aimed at State or non-State actors, cannot in themselves provide a solution. We must meet this threat together."³⁵ At this same conference, the Foreign Minister of Egypt described terrorism as "an international crime against all societies."³⁶ President Clinton was even quoted as saying "it is a grave misconception to see terrorism as only, or even mostly, an American

28. *Id.* at 150.

29. *See* text accompanying app. 1.

30. Higgins, *supra* note 1, at 4 (admitting that 188 terrorist groups carried out attacks on 3,162 victims of which 20% were either killed or wounded which included 540 international hostage-takings). *See also*, Yonah Alexander, *Terrorism in the Twenty-First Century: Threats and Responses*, 12 DEPAUL BUS. L.J. 59, 75 (1999/2000) (noting that in 1970 there were 300 terrorist attacks but by 1999 that figure had jumped to over 5,000 attacks).

31. Higgins, *supra* note 1, at 261 n.8.

32. *Id.* at 4 (noting that the majority of these attacks are concentrated in the United States and Western Europe).

33. *Id.* at 261 n. 8 (noting further that with every subsequent year the number of deaths increase by 20% with Europe alone suffering half of that).

34. Alexander, *supra* note 30, at 76 (referring to when 260 people were killed and another 5,000 were injured after the simultaneous bombings of the United States embassies in Kenya and Tanzania, supposedly masterminded by Osama bin Laden).

35. El-Ayouty, *supra* note 4, at 496.

36. *Id.*

problem.”³⁷ Kuwait declared that “it supports all collective international efforts to confront this phenomenon.”³⁸ The United Arab Emirates has also spoken out against terrorism claiming that “combating this dangerous phenomenon should not be carried out on a unilateral basis.”³⁹ Yemen has also stressed that “terrorism has become an international phenomenon. It concerns all nations and peoples, and there is a pressing need for the international community to respond immediately.”⁴⁰ Saudi Arabia’s Chief Delegate has stated that, “[v]iolence and terrorism are universal phenomena rather than the characteristics of a certain people, race or religion. Precisely because of the comprehensiveness and universality of terrorism, the only way to combat it is through a unified and collective international action, within the framework of the United Nation.”⁴¹

Terrorism is a global phenomenon⁴² and it is the responsibility of the entire world to combat its efforts. There are numerous ways in which one can try and deal with terrorism.⁴³ For example, more security has been added at airports where for years terrorists were able to come and go freely with material that should not have been able to leave the nation of origin.⁴⁴ As previously illustrated, world leaders are beginning to make public statements denouncing terrorism and drawing attention to the brutal nature of terrorist attacks.⁴⁵ Advances in technology have also allowed intelligence agencies to be better equipped to deal with potential attacks.⁴⁶

37. *Id.*

38. *Id.* at 497.

39. *Id.*

40. El-Ayouty, *supra* note 4.

41. *Id.* at 498.

42. Jacqueline Ann Carberry, *Terrorism: A Global Phenomenon Mandating a Unified International Response*, 6 IND. J. GLOBAL LEGAL STUD. 685, 686, (1999) (indicating that there are three factors that lead to terrorism being viewed as a global issue: 1. It “is not restricted to any one region, State, or jurisdiction,” 2. “the increased mobility of terrorists to cross borders, acquire resources in numerous States, and access advanced communication systems,” 3. The victims of terrorist attacks are not necessarily even members of the same State).

43. Alexander, *supra* note 30, at 89 (listing several options as publicizing it, improving intelligence gathering regarding it, enacting legislation, strengthening penalties against terrorists, and providing greater protection for facilities and officials).

44. *Id.*

45. *Id.* (illustrating that world leaders have used specific attacks to show the pointless nature of these instances).

46. *Id.* (noting that this has resulted from timely collection, analysis, and dissemination of relevant information on individual terrorists, their beliefs, means of operation, and other relevant information).

For example, in 1991, European intelligence officials were able to prevent Iraqi initiated terrorism in connection with the Gulf War.⁴⁷

Changes in pre-existing laws have also aided in combating terrorism. The problem though is that laws are not consistent. The United States is a great example of this. Since states are free to define offenses through their criminal and penal code, terrorism can be defined fifty different ways. Take Arkansas for a definitional example, it's criminal code states, "a person commits the offense of terroristic threatening if with the purpose of terrorizing another person, he threatens to cause death or serious physical injury or substantial property damage to another person."⁴⁸ There are nine general categories that terrorism falls under in United States' state law.⁴⁹

State law is not the only ambiguity that exists in the United States when it comes to a working definition of terrorism. For the past thirty years, Congress has held numerous hearings, proposed bills, adopted various resolutions, and passed a number of laws and yet there is still not a concrete definition on what constitutes terrorism.⁵⁰ However, recently Congress has been trying to pass the "long arm statute that makes it a federal crime for a terrorist to threaten, detain, seize, injure, or kill an American abroad."⁵¹ In the 1980's the Federal Bureau of Investigation drafted an interagency definition of terrorism.⁵² However, the United States Department of State went ahead and drafted their own definition contained in Title 22 of the United States Code Section 2656f(d).⁵³

Following the Oklahoma City bombing, Congress was finally able to push through terrorism legislation in both the House of Representatives and

47. *Id.*

48. Alexander, *supra* note 30.

49. *Id.* at 61 (listing them as: civil defense, antiterrorism provisions, destructive devices, terrorist threats, enhanced criminal penalties, victim compensation, street terrorism, ecological terrorism and taxes).

50. *Id.* at 62.

51. *Id.* at 90.

52. *Id.* at 62 (stating it as "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in the furtherance of political or social objectives").

53. Alexander, *supra* note at 30, 62-63 (defining terrorism as a "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience." The Code goes on to state that international terrorism is "terrorism involving citizens of the territory of more than one country," while a terrorist group is "any group practicing, or that has significant subgroups that practice international terrorism").

the Senate.⁵⁴ President Clinton signed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996 on April 24.⁵⁵ In 1996, legislation was also passed allowing United States citizens who were victims of terrorism to sue the country responsible as long as it was listed on the United States Department of State's list of nations who support terrorism.⁵⁶ A few years later, Congress passed another bill taking things a step further by allowing these same individuals to tap the frozen assets of the countries they sued in order to receive their judgement.⁵⁷ The Preparedness Against Terrorism Act of 2000 H.R. 4210, plans on implementing changes to existing laws to improve federal coordination and enhance domestic preparedness regarding terrorist attacks.⁵⁸ Also, Presidential Decision Directive (PDD-62): Protection Against Unconventional Threats to the Homeland and Americans Overseas reaffirmed PDD-39: United States Counterterrorism Policy and expanded upon the use of weapons of mass destruction and cyber warfare.⁵⁹

Other nations and organizations around the world have their own definition of terrorism and have struggled with how to combat the problem. The United Nations has experienced difficulty when it comes to trying to define terrorism. In December of 1999, the General Assembly adopted a draft of the International Convention for the Suppression of the Financing of Terrorism that includes a working definition of terrorism.⁶⁰

54. Carberry, *supra* note 42, at 689 (noting that the Comprehensive Terrorism Prevention Act of 1995 was passed in the Senate on June 7, 1995 while the House passed their own version, the Effective Death Penalty and Public Safety Act of 1996, on March 14).

55. *Id.* (indicating that the bill sets aside one billion dollars over the next four years to numerous antiterrorism programs, it requires violators to make restitution to their victims, strengthens immigration laws preventing individuals believed to belong to terrorist organizations from legally entering the United States, increases the government's power to deport foreigners convicted of crimes, and mandates that plastic explosives contain chemical taggants for tracking).

56. Anne-Marie Slaughter & David Bosco, *Sue Terrorists, not Terrorist States*, WASH. POST, Oct. 28, 2000, at A25.

57. *Id.* (quoting Republican Senator Connie Mack of Florida, "the message is clear to terrorist nations: There is a price to pay for killing Americans").

58. Charles L. Cragin, *Terrorism Preparedness*, Congressional Testimony by Federal Document Clearing House, May 4, 2000. (Noting that the Department of Defense's role "is to be prepared to provide, when requested, available military forces and capabilities to support domestic requirements specified by the Attorney General of the United States or the Director of the Federal Emergency Management Agency").

59. *Id.*

60. Alexander, *supra* note 30, at 64 (defining terrorism as "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious, or other nature, that may be invoked to justify them").

Over the years, the United Kingdom has implemented a few definitions of terrorism, some broad while others were narrower in scope. In 1996, Lord Lloyd's working definition of terrorism was "the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public, in order to promote political, social, or ideological objectives."⁶¹ The latest definition of terrorism in the United Kingdom however, is the use or threat, for purposes of advancing a political, religious, or ideological course of action which involves serious violence against any person or property, endangers the life of any person, or creates a serious risk to the health or safety of the public or a section of the public.⁶²

Based on their definition of terrorism, the United Kingdom has implemented their own legislation. For the most part their terrorism legislation has tended to focus on the clash between Catholic and Protestant populations.⁶³ The European Court of Human Rights however, does not approve of the United Kingdom's antiterrorism legislation claiming that the United Kingdom's seven-day holding period violates the European Convention on Human Rights.⁶⁴ In 1989, the United Kingdom passed the Prevention of Terrorism Act, basically a reincarnated version of the Act of 1984, that banned any form of financial assistance to terrorists and gave the Secretary of State the power to exclude people thought to be involved in terrorism without court review and empowered the police to arrest an individual without a warrant if the officer reasonably suspected involvement in acts of terrorism.⁶⁵ More recently the United Kingdom passed the Criminal Justice (Terrorism and Conspiracy) Act of 1998.⁶⁶

61. *Id.* at 63 (noting however that under the 1999 Prevention of Terrorism Bill the House of Lords wanted a Under broader definition of terrorism that would include expressions of single-issue extremism by groups).

62. *Id.*

63. Carberry, *supra* note 42, at 691 (citing the United Kingdom Prevention of Terrorism Act of 1984 that "proscribed the Irish Republican Army and the Irish national Liberation Army by placing the powers of detention, arrest, and exclusion in the hands of the Executive, designated that contributing to acts of terrorists as a crime and provided the police with the authority to conduct security checks on travelers").

64. *Id.* at 692 (noting that the government did not alter their law, "The government maintained that the seven-day period was essential and that the sensitivity of the information on which detention was based rendered its presentation to a court in the presence of the detainee impossible").

65. *Id.* at 693.

66. *Id.* at 694 (indicating its significance in the fact that it makes it easier to secure the conviction of terrorists, makes it illegal to conspire in the United Kingdom to commit a crime in

Throughout the world there are numerous treaties and conventions that address the act of terrorism.⁶⁷ The New York Convention “mandates cooperation in preventing attacks on diplomats both inside and outside their territories, open exchange of information regarding the circumstances of the crime and the alleged suspect’s identity, and coordination of administrative efforts against such attacks.”⁶⁸ The Hostage Convention also mandates that a State extradite or prosecute an individual believed to be involved in a terrorist attack.⁶⁹

There are several Conventions that specifically address the issue of hijackings. The Tokyo Convention is one such agreement.⁷⁰ The Hague Convention, like the Tokyo one, is ambiguous when it comes to the definition of hijacking however.⁷¹ The Montreal Convention however did broaden the occasions when the offense of a hijacking could occur.⁷² Despite the fact that nations may actually be a signatory to a particular Convention does not mean they will adhere to its provisions. Take Uganda for example, back in 1976, it was a part of the Entebbe hijacking episode even though it had signed various hijacking Conventions.⁷³

Besides Conventions there are also several international conferences that have been held to address terrorism. At the Ministerial Conference on Terrorism on July 30, 1996 the G-8⁷⁴ leaders adopted twenty-five practical antiterrorism resolutions.⁷⁵ In 1985, the United Nations General Assembly

a foreign country, and allows for the forfeiture of property from the convicted individual if it is found to be used in support of the terrorist organization).

67. El-Ayouty, *supra* note 4, at 492 (comprising a list of the “Hijacking Convention of 1971, the Sabotage Convention of 1971, the Internationally Protected Persons Convention of 1973, the Hostage Convention of 1979, and the Maritime Terrorism Convention of 1988”).

68. Carberry, *supra* note 42, at 701 (noting that the State in actual possession of the offender must take measures to extradite or prosecute the individual and to notify other nations of action taken and/or submit all relevant evidence to assist in prosecutorial proceedings if conducted elsewhere).

69. *Id.* at 702 (indicating however that this convention has been seriously weakened as a result of subsequent additions that allow nations to avoid extradition or prosecution).

70. *Id.* (stating that an individual can be convicted of a criminal offense even if on board a flight outside of the borders of the contracting State).

71. *Id.* (defining a hijacking as the “use of physical force, threat, or intimidation to take control of an aircraft as elements of hijacking”).

72. *Id.* (pointing out that a hijacking can occur even if the doors of the aircraft are not closed and the perpetrator is not currently present).

73. Carberry, *supra* note 42, at 703 (acknowledging that despite its known involvement Uganda was never formally punished or censured).

74. Canada, the United States, Great Britain, Germany, France, Italy, Japan, and Russia.

75. Carberry, *supra* note 42, at 704 (citing the resolutions: increased public transportation security measures, implementing global standards for detecting bombs, tightening border

adopted resolution No. 40/61, calling on all nations to "fulfill their obligations under international law to refrain from organizing, instigating, assisting, or participating in terrorist acts in other states, or acquiescing in activities within their territory directed toward the commission of such acts."⁷⁶ As a side-note, not one of the anti-terrorist conventions provide for either economic or other sanctions against States assisting terrorism.⁷⁷

E. National Responses to Terrorism

Around the world nations are facing internal terrorism. Many nations are quietly appeasing terrorism, or trying to contain it, while others have even become a terrorist's haven.⁷⁸ There is no consistency when it comes to terrorism but there are common threads that form a terrorist pattern that people can be aware of. The differences that emerge between terrorists will depend on their motivation and capabilities.⁷⁹ Governments have used terrorists and their techniques to injure or topple foreign governments.⁸⁰ The Soviet Union was also a sponsor of the Palestinian Liberation Organization (PLO) in the 1960's 1980's and maintained an extremely close military relationship.⁸¹ Another nation to engage in state sponsored terrorism is that of Iran. Approximately \$300 million is given annually to the Hezbollah,⁸² along with organizational support, logistical and operational assistance.⁸³ However, Iran claims that they do not sponsor terrorism, rather they [Iran] "only give political backing and humanitarian

controls, policing the Internet, improving exchange of intelligence information and drafting a treaty compelling countries to prosecute or extradite suspected bombers).

76. El-Ayouty, *supra* note 4, at 493 (citing a comment by Professor Oscar Schachter, "the condemnation of international terrorism thus imposes an obligation on all states to take appropriate measures to prevent acts of international terrorism. When suspected terrorists are apprehended the State must either extradite or try and punish them. This obligation, I believe, is now general customary international law").

77. *Id.*

78. *Id.* at 494.

79. Alexander, *supra* note 30, at 68 (noting that smaller terrorist groups will tend to focus on bombings while larger organizations will tend to implement more complex operations, including kidnappings, assassinations, facility attacks, and hijacking).

80. *Id.* at 68 (acknowledging that the Soviet Union and other communist states engaged in this type of behavior during the Cold War).

81. *Id.* (suggesting that the PLO received money, training, and supplies from the Soviet Union that allowed them to engage in advanced operations against the Israelis over the years, specifically the Black September attack on athletes at the Munich Olympic games in 1972).

82. "Party of G-d," an umbrella organization of radical fundamentalist Shiite groups dedicated to establishing an Islamic Republic in Lebanon.

83. Alexander, *supra* note 30, at 69 (recognizing that all this aid is used to fight "Western imperialism" in the Middle East along with removing the "Zionist" entity from the region).

aid to the groups."⁸⁴ Hezbollah also receives assistance from Syria.⁸⁵ This financial assistance has allowed the organization to kill close to 130 people while injuring another 440.⁸⁶

The United States has also recognized the nations of Afghanistan, Cuba, Iraq, Libya, North Korea, and the Sudan to be nations that sponsor terrorism.⁸⁷ Afghanistan is one of the worst nations when it comes to state sponsored terrorism. They have maintained training camps for members of the Harkat ul Majahideen.⁸⁸ This group was responsible for the December 24, 1999 hijacking of India Airline's Flight 814 from Nepal to Pakistan.⁸⁹ The Harkat ul Majahideen is not the only terrorist group that Afghanistan assists. Internationally, their worst terrorist offense is their assistance of Osama bin Laden and the al-Qaeda network.⁹⁰ Osama bin Laden is seen as a threat because of his views regarding the liberation of Saudi Arabia and Palestine along with the overthrowing of "corrupt" western-oriented governments in predominately Muslim nations.⁹¹ His operations have been widespread and destructive since the mid-1990's.⁹²

84. *Iran to host Meeting Supporting Palestinians*, CNN, Apr. 23, 2001, available at CNN.com/World.

85. Alexander, *supra* note 30, at 69 (providing a channel between Iran and the organization that also provides locations to mount their attacks against the nation of Israel through Syrian controlled areas in Lebanon).

86. *Id.* (recognizing that the Hezbollah was responsible for car bombings of the United States Embassy and Marine Headquarters in Beirut in 1983, kidnapping of numerous hostages in Lebanon in the 1980's, rocket attacks on settlements in Israel proper in the 1990's, destruction of the Israeli Embassy in Buenos Aires in 1992, and destruction of the office building housing the Argentine Jewry in 1994).

87. *Id.* at 70 (noting that these nations provide a safehaven, funding, training, and arms to various terrorist organizations around the world).

88. An Islamic terrorist group based in Pakistan and dedicated to liberating India's Kashmir.

89. Alexander, *supra* note 30, at 70 (explaining that the plane carrying 178 passengers and eleven crew members was diverted to Afghanistan where the seize ended when the terrorists coerced India into releasing three jailed comrades, one of whom had declared a Jihad (holy war) against the United States and India).

90. *Id.* at 71 (noting that along with the Sudan, Afghanistan has been assisting possibly the worst terrorist organization in the world).

91. *Id.* (citing the fact that Osama bin Laden maintains formal and informal ties with terrorist groups in Algeria, Bosnia, Canada, Chechnya, Egypt, Eritrea, France, Libya, Pakistan, Philippines, Somalia, United Kingdom, United States, and Yemen as a way to achieve his goals).

92. *Id.* at 72 (indicating that he has been held responsible for the 1993 bombing of the World Trade center in New York City, the 1996 attack in Saudi Arabia of the Khobar Towers, and the 1998 bombings in Kenya and Tanzania at the United States' Embassies). See also, Phil Hirschhorn and Deborah Feyerick, *Ex-copter pilot can't link bin Laden to Somalia*, CNN, Apr. 23, 2001, available at CNN.com/Law Center; see also Phil Hirschhorn, *Scant Evidence Shown to link bin Laden to GI deaths in Somalia*, CNN, Apr. 20, 2001, available at CNN.com/Law

In response to state sponsored terrorism there are several things that a nation may do. This includes adjusting their level of diplomacy with the specific nation in question, along with the possibility of economic sanctions, altering the level of law enforcement, and possibly the movement of military power.⁹³ A nation is allowed to expel diplomats thought to be involved in terrorism.⁹⁴ Economic sanctions are a hard measure to adhere to since they require international cooperation in many instances.⁹⁵

However, not all nations are adding to the problem of terrorism; many of them are actually helping to prevent its escalation. Today, nations are beginning to work collectively to bring terrorists to court to stand trial for their actions. Fawaz Younis,⁹⁶ was arrested during a FBI sting in international waters off of the coast of Cyprus and was eventually tried, convicted and sentenced for his crimes.⁹⁷ If it were not for the assistance of Pakistan in 1995, Ramzi Yousef may still be at large.⁹⁸ Besides extraditing terrorists, world governments are addressing the threats of terrorism by increasing security measures,⁹⁹ like adding x-ray machines at airports around the world.¹⁰⁰

F. Terrorism's New Threats

A new threat of international terrorism however is the stock piling of weapons. Many terrorist organizations are now trying to gain access to

Center. The United States is trying to claim that Osama bin Laden was also responsible for the death of eighteen Americans killed and eighty wounded during the October 3, 1993 battle in Somalia's capital of Madadishu but so far they have been unable to produce a valid link.

93. Alexander, *supra* note 30, at 91.

94. *Id.* (pointing to the fact that the United States and many Western European nations have expelled Libyan diplomats over the years thought to be involved in terrorist activities).

95. *Id.* (recognizing however that the United States has successfully imposed sanctions against Iran and Libya while the United Nations has done the same against Afghanistan).

96. *Id.* at 90. He is a Lebanese operative from the 1985 hijacking of a Jordanian airliner that included American hostages.

97. *Id.*

98. Alexander, *supra* note 30 (noting that he was arrested in Pakistan and extradited to the United States for trial). *See also*, Carberry, *supra* note 42, at 689 (commenting that Abdul Hakeem was also extradited to the United States to stand trial for his involvement in the Philippine air case April 12, 1995 along with Ishmail Najim in August from Jordan for his involvement in the World Trade Center bombing).

99. *Id.* at 90 (noting that embassies are now built with added security measures in mind along with training sessions on how to deal with various terrorist threats).

100. *Id.* at 91 (admitting that they are not fool proof but effective none the less).

weapons of mass destruction.¹⁰¹ When its leaders were arrested after the Sarin gas attack in Japan back in 1995 the organization, Aum Shinrikyo, was actively seeking lethal weapons.¹⁰² People should be concerned about this because if a nuclear bomb was to get into the wrong hands an explosion of one kiloton anywhere could cause more than 100,000 fatalities and damage totaling billions of dollars.¹⁰³

When trying to combat terrorism people need to consider the socio-economic causes like poverty, hopelessness, and the non-observance of human rights driving young people into the arms of terrorism where "they find communal support, an identity and a cause through which they vent their anger through the heinous crime of terror."¹⁰⁴ For an economist, to eradicate terrorism one must alter the benefits and cost structures to the point where peace is the most viable and optimal solution.¹⁰⁵ Terrorism is not something that is going to vanish anytime soon. There are numerous causes that will continue to fuel its existence and unfortunately its expansion. Terrorism may be impacted by the growing xenophobia around the world directed against immigrants, refugees, asylum seekers, guest workers, and other "undesired" foreigners.¹⁰⁶ New laws, stricter security or enforcement measures, and military strikes may actually prove counterproductive and result in the escalation of terrorism instead of reduction.¹⁰⁷ Another factor that may lead to terrorism's growth is that of heightened goals among terrorists.¹⁰⁸

Around the world there are various forms of terrorism. One is that of biological terrorism. "Future terrorists wishing to wreak mass casualties

101. *Id.* at 72 (acknowledging that Osama bin Laden is trying to acquire biological, chemical, and nuclear weapons to use in subsequent attacks).

102. *Id.* at 63 (indicating that this Japanese doomsday cult had killed twelve and injured over five thousand with the release of the Sarin gas on the Tokyo subway). *See also, The Anthrax Threat*, THE ECONOMIST, Oct. 26, 2001, (pointing out that the intention was to kill thousands). Despite spending thirty million the cult could not produce the Sarin gas in a pure enough form, could not develop an effective delivery mechanism or distribution system.

103. Alexander, *supra* note 30, at 77 (noting that this would be only one-twentieth of the power released in the Hiroshima attack).

104. El-Ayouty, *supra* note 4, at 497.

105. Higgins, *supra* note 1, at 4.

106. Alexander, *supra* note 30, at 78 (noting that terrorism will also grow as a result of the publicity that is generated from attacks, the fact that arms, explosives, supplies, financing, and secret communication are all readily available, and international support networks exist that underwrite the activities).

107. *Id.* at 79 (noting that some terrorist organizations may actually try more defiant types of terrorism as a result).

108. *Id.* at 80 (eluding to the fact that as goals increase so to will terrorism because ideological and political violence is often seen as the means to an end).

may well turn to biological weapons."¹⁰⁹ This results from the fact that as biotechnologies proliferate it is making it easier for state and non-state actors to develop weapons relatively easily and cheaply.¹¹⁰ A second form of terrorism is chemical in nature. The first instance of chemical terrorism occurred all the way back in 1915 when Germany released liquid chlorine from pressurized cylinders, allowing the poisonous gas to drift over enemy lines.¹¹¹ Chemical and biological terrorism has been beneficial for terrorists because of their lost cost, ease and speed of production, along with the notion that people of limited education and facilities can develop them.¹¹² Nuclear Terrorism is also a possibility.¹¹³ It is growing in use as well with the advent of nuclear bombs and fissionable material.¹¹⁴ Non-nuclear attacks are likely as well with radio-frequency capabilities.¹¹⁵

III. THE NEWEST FORM OF TERRORISM

A. A Descriptive Analysis

The newest form of terrorism to emerge is that of cyberterrorism and information warfare¹¹⁶ to manipulate computer systems to disrupt or incapacitate infrastructures.¹¹⁷ This type of attack is the focus of the

109. James Saxton, *Domestic Terrorist Threats*, Congressional Testimony by Federal Document Clearing House, May 23, 2000 at a Special Oversight Panel on Terrorism (quoting Rep. James Saxton at the Open Hearing on Biological, Nuclear, and Cyber Terrorism). Although the first biological weapon used was probably plague-infected bodies during medieval times by besieging armies who tossed them over city walls in hopes of spreading disease. *Old scourges and new*, THE ECONOMIST, Oct. 6, 2001, available at 2001 WL 7320529.

110. *Id.* (acknowledging that many of the same technologies that go into fermenting beer can be used to manufacture biological weapons).

111. *Old Scourges and New*, THE ECONOMIST, Oct. 4, 2001, available at 2001 WL 7320529.

112. *Id.* at 82 (suggesting that this is the case because these weapons can be purchased without raising much suspicion and the space needed to build them is minimal).

113. Saxton, *supra* note 109 (maintaining that the theft or sale of such weapons is likely with lax security and possible monetary gain).

114. Alexander, *supra* note 30, at 82 (opining that for now nuclear terrorism will occur only as a credible threat or hoax involving a nuclear device, holding for political or economic blackmail a nuclear facility, or the bombing of a nuclear reactor site itself).

115. Saxton, *supra* note 109 (indicating that the United States' electronic infrastructure could be damaged by such attacks).

116. Alexander, *supra* note 30, at 84 (defining information warfare to consist "of a broad spectrum of threats ranging from electronic jamming to psychological operations underscoring the perpetrators' deliberate exploitation of military and civilian information systems' inherent vulnerabilities and thereby adversely affecting national and global security" quoting the author of the article).

117. Saxton, *supra* note 109.

remainder of this paper. Many believe cyberterrorism¹¹⁸ began as something just for fun, but evolved into industrial espionage and eventually culminated in political motives.¹¹⁹ Cyberterrorists can be individuals, criminal organizations, dissident groups or factions, or even another nation.¹²⁰ The reason cyberterrorism is growing so fast is because of how easy it is to launch a cyberattack. All one has to do is infect one computer and then allow it to pass through a network, infecting other machines or the entire network based on the program launched.¹²¹ The only tools needed to launch such an attack are a computer, modem, telephone, and hacker software.¹²²

The cyberworld has developed a language all its own when it comes to cybercrime. At one point it was very simple, the good guys were Hackers while the bad guys were Crackers. Today everyone involved in cybercrime is identified as a Hacker,¹²³ those with an interest in the workings of a computer.¹²⁴ "Hackers" are individuals with a certain code of ethics; they do not damage systems or data and are good programmers.¹²⁵ However, there are some hackers who are beginning to emerge lacking this code of ethics.¹²⁶ "Crackers,"¹²⁷ on the other hand, are not bound by any ethics; they break into systems with malicious intent or

118. See generally, *Cybercrimes: Infrastructure Threats From Cyber-Terrorists*, 2 CYBERSPACE LAWYER 23, (1999) (defining cyberterrorism as "the use of computing resources against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives").

119. Vijay Mukhi, *Internet Instructor/Political Hacking*, THE TIMES OF INDIA, Nov. 8, 2000, available at 2000 WL 28353566 (stating that at first it was just to acquire credit card numbers, and then it evolved to companies illegally accessing customer and product information from the other). See also *Cybercrimes*, *supra* note 118, at 23.

120. *Cybercrimes*, *supra* note 118, at 23 (noting that attacks can be internal or external and may be directed against a computer system, or focus on the infrastructure itself).

121. Mukhi, *supra* note 119, (noting that once a system is infected it can send out the IP (Internet Protocol) address of your computer to a machine anywhere around the world or send out its own code as an e-mail attachment and then trigger itself once the attachment is opened).

122. *Cybercrimes*, *supra* note 118, at 23.

123. Mukhi, *supra* note 119.

124. Yeang Soo Ching, *Curbing Attacks on Websites*, THE NEW STRAITS TIMES, (Malaysia) Jan. 14, 2001, available at 2001 WL 9499310.

125. *Id.* (noting that their activities are both productive and creative). See generally, Jennifer McKee, *Hackers of a Different COLOR*, ALBUQUERQUE J., Feb. 11, 2001 (acknowledging that they tend to be older individuals who are gainfully employed and educated).

126. Ching, *supra* note 124 (indicating that these individuals are being called Black Hat Hackers while those who maintain the code of ethics are beginning to be referred to as White Hat Hackers).

127. McKee, *supra* note 125 (analyzing that the term derived from people "cracking" into websites or software copyrights).

strictly for money while destroying both data and systems.¹²⁸ Below Crackers are “Script Kiddies,” individuals who buy or download “scripts” that will search the Internet for crackable sites.¹²⁹ “Hactivists”¹³⁰ are computer hackers with political and social agendas.¹³¹ While “cybervandals” are individuals whose actions alter information on spreading dogma on political and social sites.¹³² “Denial of service”¹³³ refers to attacks that overwhelm a computer’s ability to handle incoming messages.¹³⁴ “Defacers” are those who “deface” a website or system.¹³⁵ “Defacements” are a common cracker prank and include WebPages that crackers post over with pre-existing websites that they have cracked.¹³⁶ While a “Patch” refers to computer codes that can be used to fill in security gaps left by crackers when they broke into the website.¹³⁷ “Trojan Horses” are programs that appear to perform a useful function and sometimes do so quite well but also includes an unadvertised feature, which is usually malicious in nature.¹³⁸

128. Ching, *supra* note 124 (acknowledging that these individuals rarely write their own programs and their efforts are completely destructive in nature).

129. McKee, *supra* note 125 (labeling them the “ultimate poseurs” and calling them the “lowest form of code tweakers” according to Codeflux.com, a hacker website that publishes a “jargon dictionary”).

130. Naomi Koppel, *Anti-globalist Protesters Turn to Hacking to Thwart Opponents*, THE CANADIAN PRESS, Feb. 8, 2001, available at 2001 WL 12573165 (recognizing that the term was first applied to Zapatista supporting rebels in Mexico’s southern state of Chiapas who held virtual sit-ins and sabotaged Mexican government websites since 1998).

131. Jon G. Auerbach & William M. Bulkeley, *Net is New Frontier for Cyberterrorism, Activism, Even War: Electronic Battlefield is Site for Hand-to-Mouse Combat*, THE WALL ST. J. EUR., Feb. 11, 2000, at 23 (noting that these individuals have vandalized government websites). See also Jim Wolf, *Business Faces Growing Threat of ‘Hactivism,’* THE GLOBE AND MAIL, Nov. 9, 2000, available at 11/09/2000 GlobemailT4 (recognizing that hactivism incorporates the methods of guerilla theatre, grassroots organizing, and graffiti to cyberspace).

132. Auerbach, *supra* note 131, at 23.

133. Bruce Sterling, *Revenge of the Smurfs*, THE WALL ST. J. EUR., Feb. 16, 2000, at 10 (suggesting that this term along with “distributed coordinated attacks” may be replaced with “Smurfing.” Further noting that it is not a big deal, no security is broken, firewalls are not melted down, no data is stolen, instead it just jams up the works; thus it is cheap, quick, dirty, and highly effective).

134. Auerbach, *supra* note 131, at 23.

135. McKee, *supra* note 125 (noting that sometimes these individuals will even provide links to sites that will correct the problem or links to the actual website that they have “defaced”).

136. *Id.*

137. *Id.*

138. *Cybercrimes*, *supra* note 118, at 23.

B. *The Growth of Cyberterrorism*

There are many factors, which seem to be operating, that allow for cybercrime both internally and externally according to Raja Azrina Raja Othman, the MyCert project head.¹³⁹ Cyberterrorism seems to be the new way to wreak havoc around the world. "The World's growing dependence on the Internet opened the door to renegade individuals and states who could cripple economies and inflict death by remote control."¹⁴⁰ The threats of cyberattacks grow with every passing day. There are three basic reasons for this. The first reason is the international growth of the Internet itself, which causes "policing" to be much more difficult.¹⁴¹ Secondly, there are already over 30,000 hacker-oriented websites, which makes it extremely easy for people to acquire the knowledge necessary to disrupt or destroy whatever they are seeking.¹⁴² And finally, with the end of the Cold War came a mass exodus of terrorist organizations to other locations around the world making it difficult to track them.¹⁴³

The reason that cyberterrorism is seen as so problematic is because an attack could come from anyone or anywhere¹⁴⁴ and could take any form.¹⁴⁵ Hypothetically speaking, an organization with a budget of say ten million with thirty computer experts strategically located throughout the world could bring the United States to its knees with a well-coordinated cyberattack.¹⁴⁶ "Computer networks will increasingly be the main

139. Ching, *supra* note 124 (listing the internal factors as: "Lack of control and poor management in computer administration;" "lack of knowledge and exposure in aspects of computer security," "low priority given by top management;" "poor or haphazard computer network and system design that is unsafe, ill-equipped with security components, and misconfigured systems and application," outdated software and lack of maintenance." The external factors cited include: "Free exploit tools or programs available over the Internet;" "Vulnerable computer systems and application," "Motivation . . . to establish status quo or for monetary gain," and "Lack of ethics and professionalism among budding technologists").

140. Richard Ingham, *Cyberterrorism: Death, Ruin at a Touch of the Return Key*, AGENCE FRANCE-PRESSE, May 16, 2000 (QUOTING FOREIGN MINISTER YOHEI KONO AT the conference on cybercrime at the G8 (Group of Eight) meeting).

141. Alexander, *supra* note 30, at 86 (estimating that there are already 120 million users and there will be close to a billion by 2005).

142. *Id.* (indicating that these sites contain information on step-by-step instructions, Trojan horses, and logic bombs).

143. *Id.*

144. Ingham, *supra* note 140 (noting that an attack could result from a single assailant, a group or government holding cheap equipment and knowledge pertaining to the Internet's structure).

145. *Cybercrimes: supra* note 118, at 23 (listing thirteen possible forms that a cyberterrorist attack could take).

146. Alexander, *supra* note 30, at 86.

battleground for armies and terrorists. Computers are the roads and bridges of the Information age . . . the most important targets for people or organizations bent on disabling communications. It's a basic military tenet . . . [t]ry to shut down your enemy's infrastructure."¹⁴⁷

C. Cyberterrorism's Impact and Coverage

Right now cyberwar is emerging as the "third largest threat" to developed nations behind chemical and bacteriological attack and nuclear weapons."¹⁴⁸ Every week more than fifty computer viruses are released.¹⁴⁹ Also, every week a new computer hacker cracks into Pentagon computers or breaks into the databases of banks or other financial institutions.¹⁵⁰ It has even been reported that over \$400 million in financial losses resulted from cyberattacks in 2000, up 40% since 1999.¹⁵¹ In 1999, it has been reported that the United States had \$12.1 billion dollars in damage caused by Internet viruses with the Melissa virus costing close to \$10 billion across the world.¹⁵² It is believed that only 25% of wired companies are secure.¹⁵³ Currently, it is believed that close to 80% of all foreign attacks on United States computers either originated in or passed through Canada.¹⁵⁴ This is believed to be the case because Canada is such a wired nation.¹⁵⁵ Recently, in Edmonton and Calgary "Hacking Schools" were

147. Auerbach, *supra* note 131, at 23 (quoting Stanton McCandlish of the San Francisco privacy and civil liberties group Electronic Frontier Foundation).

148. Ingham, *supra* note 140 (referring to a comment made by Colin Rose of Buchanan International, a Scottish-based company specializing in tracking Internet offenders. He went on to say "The potential for harm is enormous. If you can destroy industries and essential services with the touch of a button, you don't need to bother with bombs").

149. Ann McFeatters, *Russian Spy is Not the Threat*, THE MILWAUKEE J. SENTINEL, Apr. 2, 2001, at 11A.

150. *Id.*

151. *Cooperation Urged Against Cyberterror*, THE SAN DIEGO UNION-TRIB., Mar. 23, 2001, at A8.

152. 'Internet Widening Gap Between Haves, Have-nots,' BUSINESS TIMES (MALAY.), Jun. 5, 2000.

153. Judy Monchuk, *Cyber Security Big Item for Businesses Wary of the Next Mafiaboy*, THE CANADIAN PRESS, Feb. 7, 2001, available at 2001 WL 12573245.

154. Martin Stone, *Canada Called Hotbed of Cyberterrorism*, NEWSBYTE NEWS NETWORK, Mar. 27, 2000 (relying on an American intelligence agency determination).

155. *Id.* (indicating that "the high number of hacker attacks coming from Canada is due to a high degree of computerization . . . Canada is a very wired country and that hackers will typically bounce through different computer systems to hide their original location." Colonel Randy Alward).

established to address the issue of cyberattacks.¹⁵⁶ The cost of a training session can range from \$500 all the way up to \$5,000.¹⁵⁷ China, on the other hand, is looking to establish similar schools with the exact opposite intention.¹⁵⁸

Currently, cyberattacks are mounting around the world. It is believed that political cyberterrorism has been around since 1998 as far as web defacement and denial of service attacks are concerned.¹⁵⁹ But cyberattacks may go back as far as 1986, when West German hackers stole passwords, programs, and other data for the KGB.¹⁶⁰ The United States' Pentagon systems and a nuclear weapons lab were among several targets for an Israeli hacker in February of 1998.¹⁶¹ This past New Year's Eve there was also a conspiracy plot to take down the Internet.¹⁶²

China has been involved in many cyberattacks on both sides. Two years ago, after the accidental bombing of the Chinese Embassy in Belgrade, China "retaliated" electronically.¹⁶³ In China, as military tensions have risen, there have been reciprocal attacks on computer networks between the mainland and Taiwan.¹⁶⁴ It has been estimated that Taiwan's governmental network has been broken into over 150 times with a report suggesting that over 72,000 attacks have been launched against

156. Monchuk, *supra* note 153 (differentiating kids who want to learn how to be a hacker from companies who are signing up employees to learn how to build a defense).

157. *Id.* (recognizing that the more expensive course is much more in-depth).

158. Frank J. Cilluffo et al., *Bad Guys and Good Stuff: When and Where will the Cyber Threats Converge?*, 12 DEPAUL BUS. L.J. 131, 151, (1999/2000) (claiming that China wants to train "cyberwarriors" at Army schools to wage war over the Internet and eventually establish a fourth branch in their military devoted to Information Warfare).

159. Elinor Abreu, *Chinese Hackers are Blamed for Vandalizing U.S. Websites*, Apr. 13, 2001, available at Thestandard.com/article/0,1902,23717,00.html (providing that this first attack seems to have been from a British hacker who published anti-nuclear messages on about 300 websites).

160. Alexander, *supra* note 30, at 84 (noting that this was accomplished after they broke into military, scientific, and industry computers in the United States, Western Europe, and Japan).

161. *Id.* (indicating that Ehud Tenenbaum and two other young collaborators from California engaged in the cyberattacks).

162. Victoria Shannon, *Tech Brief: Internet Conspiracy*, INT'L HERALD TRIB., Jan. 15, 2001, at 12 U.S. (Indicating that four Israeli youths had been arrested, their computers, floppy disks, CD-ROMs and other equipment confiscated).

163. Cilluffo, *supra* note 158, at 151 (referring to the cyber activity that they engaged in which revealed close to 4,000 back doors," allowing outsiders to regain access to programs at a future date, into United States computer systems).

164. Auerbach, *supra* note 131, at 23. See also, Cilluffo, *supra* note 158, at 153 (indicating that the cyberattacks resulted from Taiwan's President Lee Teng-hui stating that there should be relations between the two nations as equals).

Taiwan.¹⁶⁵ Another incident linked to China has been the e-mail bombs that have proliferated the Chinese spiritual group Falun Dafa's website.¹⁶⁶ China is also under investigation for the defacement of nine United State websites as a possible retaliatory measure after one of their fighter jets was downed in early April.¹⁶⁷

The North Atlantic Treaty Organizations' (NATO) website along with other government related sites have been bombarded with electronic mail and hit with antiwar rhetoric.¹⁶⁸ Since the start of the Al Aqsa Intifada between Israel and Palestine no permanent damage has resulted from their cyberwar campaign.¹⁶⁹ So far it seems that this type of cyberterror has only been used to raise awareness pertaining to each side's cause.¹⁷⁰ In fact, the virus that was released contained a note indicating that no damage would result.¹⁷¹ An issue not quiet addressed yet however is the public's perception of such attacks.¹⁷²

People should not believe that the United States is immune from involvement. There are rumors that the United States spent more money trying to cripple Iraq "invisibly" during the Gulf War than we spent on military hardware.¹⁷³ There are also rumors that President Clinton

165. Cilluffo, *supra* note 158, at 153 (according to Pentagon estimates the spreading of two Taiwanese viruses have caused \$120 million in damage and damaged 360,000 computers in China).

166. Auerbach, *supra* note 131, at 23 (suggesting that China was responsible because at the time China was engaged in cracking down on this group while a British agency was able to track transmissions that seemed to originate from XinAn Information Service Center in Beijing, thought to be a subsidiary of the Chinese Ministry of Public Security).

167. Abreu, *supra* note 159.

168. Auerbach, *supra* note 131, at 23 (indicating that the attacks might have originated from activists connected with the Serbian side of the Balkan conflict). See also Alexander, *supra* note 30, at 85 (calling these attacks "Aping attacks" because of the way that they establish communication with a target computer and then occupy its functions by continuously staying linked and "feeding" it information). See also Cilluffo, *supra* note 158, at 149 (suggesting that a group called Crna Ruka [Black Hand] could be responsible because they had attacked the Kosovo Information Center the previous year).

169. *Pro-Israel Hackers Told to Ignore 'Cyberterror,'* HA'ARETZ, Mar. 23, 2001 (citing that there was a pro-Palestinian e-mail virus that struck 10,000 Israeli e-mail users).

170. *Id.* (noting however that things could get out of hand if one side decided to up the ante).

171. *Id.* (indicating that the attacks so far have been superficial, mainly defacing websites as opposed to damaging infrastructures that could cause huge economic damage).

172. *Id.* (suggesting according to Yael Shahar, Webmaster at the International Policy Institute for Counter Terrorism at the Interdisciplinary Center, Herzliya that "many groups on both sides have realized that hacking, while intended to create 'public relations' for their cause, is actually viewed by the public as criminal activity").

173. Ingham, *supra* note 140 (according to Colin Rose).

authorized a plan to destabilize Slobodan Milosevic by employing hackers to disrupt his foreign bank accounts.¹⁷⁴

D. New Weapons and their Impact on Cyberterrorism

Its not just cyberattacks that are alarming nations but what terrorists are using personal computers for. As technology advances, many terrorist organizations have gone online. For example, the Hezbollah maintain a daily record of "heroic" battles carried out by its fighters in Southern Lebanon on its official website.¹⁷⁵ Besides website propaganda, terrorists are using their personal computers to store information pertaining to their plans for future attacks.¹⁷⁶ It is even believed that Osama bin Laden's organization is maintained through satellite "uplinks" and encrypted messages that they pass back and forth through their computers.¹⁷⁷ According to United States officials, encryption has become the "everyday tool of Muslim extremists."¹⁷⁸

Currently, there are new weapons at the disposal of cyberterrorists. They are no longer limited to just computers. In corporate "spec wars" cyberterrorists have begun using Magnetic Pulsing Devices that erase data up to 100 yards without leaving any trace or evidence of their users.¹⁷⁹ Another weapon at the disposal of cyberterrorists besides a computer is a HERF gun; it can destroy a server from thirty yards away.¹⁸⁰ The gun works by changing all the 0s and 1s into only 0s leaving permanent damage in which none of the effected data can be recovered.¹⁸¹

174. Cilluffo, *supra* note 158, at 150 (noting that there was also a suggestion that the United States was planning an attack on the Yugoslav command-and-control network along with the air defense system).

175. Alexander, *supra* note 30, at 87 (noting that Afghanistan now publishes its radical form of Islam on the Internet as well).

176. *Id.* (indicating that Ramzi Ahmed Yousef had plans on his personal computer to blow up several American airlines over the Pacific Ocean, he is currently in jail for his role in the World Trade center bombings).

177. *Id.* See also Jack Kelley, *Terrorists Use Web to Mount Attacks*, THE ARIZ. REPUBLIC, Feb. 6, 2001, at A9 (estimating that encryption has enabled Osama bin Laden to carry out his three latest plots).

178. *Id.* (recognizing that "Uncrackable encryption is allowing terrorists Hamas, Hezbollah, al-Qaeda, and others - to communicate about their criminal intention without fear of outside intrusion." FBI Director Louis Freeh at a closed door Senate testimony panel on terrorism last March).

179. Patrick Sweeney, *Be Aware of Off-Site Storage Security*, 38 COMM. NEWS, Feb. 1, 2001, at 76 (pointing out that this weapon is small enough to fit inside a cigarette carton making it almost impossible to track into the office).

180. *Id.* (noting that the weapon can be made easily by anyone for less than \$600).

181. *Id.*

E. What's Being Done to Deal with the Problem

It may be hard to address the problems raised by cyberterrorism because politically motivated attacks can be difficult to investigate or prosecute.¹⁸² That does not mean nothing is being done to address the problem. The Department of Justice and the Federal Bureau of Investigation in 1998 formed a new unit called The National Infrastructure Protection Center to address cyberterrorism issues.¹⁸³ The Department of Justice has also established an internal Computer Crime and Intellectual Property Section (CCIPS) to address international computer crimes.¹⁸⁴ These are not the only things the United States government has done in an effort to eliminate cyberterrorism. President Clinton outlined four cyberterrorism initiatives in 1999 during a speech that he delivered at the National Academy of Sciences.¹⁸⁵ And then last year, he announced further initiatives to counter the evolving problem of cyberterrorism. One suggestion was offering college scholarships to individuals who studied computer security in return for their public service upon graduation.¹⁸⁶

We need to do more to bring people into the field of computer security. That's why I am proposing a new program that will offer college scholarships to students in the field of computer security in exchange for their public service afterward. This program will create a new

182. Abreu, *supra* note 159 (indicating the thoughts of Michael Vatis, the director of the Institute for Security Technology Studies at Dartmouth College. "[A]nytime you have political tension in the world, it's being mirrored by attacks in cyberspace").

183. Auerbach, *supra* note 131, at 23 (indicating that the unit was established to strengthen the United States' defenses against cyberterrorism and other electronic threats). See also Tom Spring, *Cyber vandalism is Tough to Thwart*, PC WORLD ONLINE, Feb. 9, 2000, at 2000 WL 8855770 (highlighting that malicious hackers could be fined upwards of \$250,000 and/or between five and ten years in jail).

184. Bruce Braun et al., *WWW.CommercialTerrorism.com: A Proposed Federal Criminal Statute Addressing the Solicitation of commercial Terrorism through the Internet*, 37 Harv. J. 159, 177 (2000) (citing the Department of Justice website indicating that the goal of the section is for "government officials . . . the private sector . . . academic institutions, and foreign representatives to develop a global response to cyberattacks").

185. Jon Baumgarten et al., *Clinton Attacks Cyberterrorism*, 1 CYBERSPACE LAW. 16, (1999) (outlining the four initiatives as follows: A Critical Infrastructure Applied Research Initiative, tasked with detecting various activities or codes; Computer Intrusion Detection Networks which will evaluate and design networks to detect attacks and warn other systems; Information Sharing and Analysis Centers established to encourage private-sector development along with providing outreach and training programs, and finally. Cyber Corps to set-up scholarships and financial aid programs).

186. *Scholarships Planned as Part of Fight Against Cyberterrorism*, THE ARIZ. REPUBLIC, Jan. 8, 2000, at A4.

generation of computer security specialists who will work to defend our nation's computers.¹⁸⁷

Another initiative involved a \$2 billion package to counter cyberterrorism by securing the nation's computer systems.¹⁸⁸ Included in this plan would be an increase in governmental funding for research and development, establishing a ROTC-type corps of information technology specialists and forging a new partnership with the private sector.¹⁸⁹ President Clinton was also interested in establishing The Institute for Information Infrastructure to "fill research gaps that neither public nor private sectors are filling today."¹⁹⁰ The House Energy and Commerce Subcommittee on Oversight and Investigations have also scheduled hearings to discuss how vulnerable the United States is to cyberattack.¹⁹¹

California seems to be paving the way of cracking down on cyberattacks within their state. California Governor Gray Davis signed a bill introduced by Assemblyman Rico Oller, R-California, which raises the fines for first-time offenders from \$250 - \$1,000 as long as no harm resulted from their access to computers or unauthorized domain name offenses.¹⁹² Under the new law, first-time hackers who do not cause damage by introducing a new virus could face a fine of \$5,000 or one year in jail.¹⁹³

Current federal criminal laws that have been used to address Internet crime have included laws against mail and wire fraud, the federal riot act, consumer protection acts, commerce protection acts, and statutes prohibiting the issuance of threats and solicitations of violent crimes.¹⁹⁴

187. Transcript of Clinton's Remarks on Cyberterrorism, upon departure, U.S. NEWSWIRE, Jan. 7, 2000.

188. Deborah Kalb, *Lawmaker Andrews to Propose own Cyberterrorism Bill*, GANNETT NEWS SERV., Jan. 19, 2000.

189. *Cyberterror Fighting Plan to be Unveiled*, THE ARIZ. REPUBLIC, Jan. 7, 2000, at A8.

190. Transcript, *supra* note 187 (quoting President Clinton again at the news conference on the South Lawn at 9:28 a.m. EST indicating that the Institute would "bring to bear the finest computer scientists and engineers from the private sector, from universities and from other research facilities to find ways to close these gaps").

191. Peralte C. Paul, *Reno Warns of Cyberterrorism Threat*, THE ATLANTA CONST., Apr. 6, 2001, available at 2001 WL 3668026.

192. Ronna Abramson, *California Cracks Down on Cyberterrorism*, THE INDUSTRY STANDARD, Sept. 28, 2000 available at www.TheStandard.com/article/o,1902,18961,00.htm (explaining that this also raised the violation from an infraction to a misdemeanor).

193. *Id.* (noting that second-time offenders could face \$10,000 and up to three years in a state prison if their action results in harm).

194. Braun, *supra* note 184, at 164-65 (noting that despite the laws being on the books for decades many of them were not enacted with Internet activity in mind and thus do not correctly apply to the problem).

Because these laws do not specifically address the problem of Internet terrorism some academics from Harvard College have decided to draft a proposed statute.¹⁹⁵ The authors of this statute, Bruce Braun, Dane Drobný, and Douglas C. Gessner, President and Fellows of Harvard College, believe that as things stand currently, the Internet resembles the "lawless Wild West."¹⁹⁶ The authors further pointed out, that the United States Justice Department has done little to track down and prosecute Internet terrorists.¹⁹⁷ For purposes of their statute they have defined "commercial terrorism as the unlawful use of force or violence against persons or property to intimidate or coerce commercial interests."¹⁹⁸

The first section of their proposed legislation includes the definitions for "Internet," "Interactive computer service," and "Information content provider."¹⁹⁹ Part II of the draft addresses "Online solicitation to commit a crime of violence."²⁰⁰ Here they lay out the punishment for those who "transmit[s] or cause[s] to be transmitted via the Internet or interactive computer service in interstate or foreign commerce any communication containing any demand or request that another person engage in conduct constituting a felony in violation of state law or the laws of the United States."²⁰¹ Many provisions of their proposed legislation are based on existing federal legislation that has been altered to encompass Internet related crimes.²⁰² There are potential problems with this legislation when it comes to enforcement however. The Internet has allowed for anonymity. A terrorist can easily hide his/her identity and if the prosecution cannot

195. *Id.* at 159.

196. *Id.* at 160 (describing the Internet as being "open to governance by human instincts, including those of greed, deception, and hate").

197. *Id.* (noting that even if the Justice Department made prosecution of Internet terrorists a top priority little could be done because of current laws, they are either "too broad, too cumbersome, or fail to address the type of destruction caused by Internet terrorism").

198. *Id.*

199. Braun, *supra* note 184, at 169-70 (acknowledging that these definitions "parrot" the Communications Decency Act, 47 U.S.C. § 230(e) (1994), and were not struck down by a recent Supreme Court decision based on this provision).

200. *Id.* at 169-70.

201. *Id.* at 170 (setting forth the possibility of an affirmative defense if the defendant is able to thwart the commission of the crime that was solicited or prove that they were not a party to the commission of the crime but were rather used as an unknown conduit for dissemination of the information. However, the statute further notes that it is not a defense to claim that one is immune from prosecution).

202. *Id.* at 171 (noting that certain provisions are based on 18 U.S.C. § 373 (1994)).

track him/her down then there is no case.²⁰³ As a result, for successful enforcement, the authors suggest that the federal government work in conjunction with academics, the private sector, and the Internet community.²⁰⁴ However, this cyber-manhunt²⁰⁵ is not impossible.²⁰⁶

The United States is not the only nation to begin to address the concerns surrounding cyberterrorism. Japan has also begun to implement strategies to counter the threat after learning how vulnerable they are. It seems that Japan is an easy target for cyberterrorism because many of its leaders are computer illiterate when it comes to understanding computer networks or the threats they face.²⁰⁷ "Until those attacks, very few people in the government, business, or the media had even heard of cyberterrorism."²⁰⁸ In February of last year, Japan implemented a law allowing for the prosecution of hackers as a result of worldwide pressure.²⁰⁹ A network will be established that links the Ground Self-Defense Force, the Maritime Self-Defense Force and the Air Self-Defense Force, along with construction of integrated information and communication networks that include an anti-cyberterrorism unit.²¹⁰ This unit will be designed to monitor the agency's networks and to protect its data.²¹¹ Other areas covered include a guarantee of the interoperability of this network with the

203. *Id.* at 174 (describing the difference that occurs in a "typical" criminal act in which eyewitnesses or written documentation can be gathered as opposed to an Internet terrorists' "ability to remain anonymous").

204. Braun, *supra* note 184, at 175 (opining that this is the best method for three reasons. First, the expertise or technology are within the private sector or academic world. Second, as Internet consultants emerge on the screen they are going to have to work with law enforcement officers. And finally, due to the size of the Internet, a centralized government enforcement would be ineffective).

205. *Id.*

206. *Id.* at 176 (pointing out that a lot of Internet terrorists will not try to conceal their identity making it easy to find and prosecute them. Also, the federal government has resources that could be transferred to this type of endeavor).

207. *Cyberterrorism Expert Fears Risks for Japan*, THE WALL ST. J. EUR., Mar. 8, 2000, at 26.

208. *Id.* (quoting Raisuke Miyawake, a former government official referring to attacks successfully launched by hackers who attacked Japanese government websites criticizing them for trying to "whitewash" its military record during World War II).

209. *Id.* (expressing that "[o]ther industrialized countries have had to urge Japan to strengthen its legislative defenses against cyberterrorism" according to Mr. Miyawake).

210. *Defense Agency to Develop IT by Fiscal 2003+*, JAPAN POL'Y & POLS., Dec. 4, 2000, available at 2001 WL 29267566 (resulting from a Defense Agency draft outline regarding IT to be implemented by 2003).

211. *Id.*

United States military in Japan and for research into what IT developments will do to military technology.²¹²

The Liberal Democratic Party (LDP) has established a task force to address the issue, seeking a special command office, a team of specialists devoted to cybercrimes, the need to strengthen computer security systems, and nurturing experts to combat cybercrime.²¹³ The LDP came up with a proposal suggesting that the nation strengthen website security and related systems, including a two-stage schedule of how to accomplish this and indicated that a board of government officials and cybercrime experts from the private sector should be established.²¹⁴

Like California in the United States, Malaysia seems to be the pioneer in the East when it comes to combating cyberattack. Hacking has been illegal in Malaysia since 1997.²¹⁵ However, that has not stopped the problem. In the first eight months of 1999, Malaysia had forty-seven cases of website hacking while in the previous year they only had twenty-eight.²¹⁶

F. Critics of the Importance Placed on Cyberterrorism

Despite world concern, there are individuals who do not see cyberterrorism as a valid issue at all.

Look, nobody died. When a site is down, there may be some lost business. But look at all the problems we have over the registration of guns. People die as a result of guns. Maybe the government should be paying a little more attention to weapons that actually kill people.²¹⁷

Mr. Bridges went on to state, "I don't think cyberterrorism is going to accomplish anybody's death. Recipes have been on the Internet for a long time. The problem is all these words with 'cyber'-prefixes are ways to create jingoist alarmism."²¹⁸ Joel de la Garza of the security firm

212. *Id.*

213. *LDP Task Force Outlines to Combat Cyberterror*, THE YOMIURI SHIMBUN / DAILY YOMIURI (ASIA), Feb. 10, 2000, available at 2000 WL 4642972 (noting that the task force was established as a result of attacks by hackers on ministry and agency Web sites).

214. *Id.* (recommending in the long term a law on high-net crimes and a campaign to educate the public on proper and improper usage of the Internet).

215. Ching, *supra* note 124 (referring to section 5 of the Computer Crimes Act of 1997 indicating that a penalty of RM100,000 can be fined or jail time up to seven years).

216. *Id.*

217. Kevin Featherly, *Feds Run out of Leads in DOS Attacks*, NEWSBYTES NEWS NETWORK, Mar. 10, 2000, available at 2000 WL 2274483 (quoting Andrew Bridges, a new media attorney at Wilson Sonsini Goodrich and Rosati in Palo Alto, California).

218. *Id.* (quoting Andrew Bridges).

Securify argues that many web defacements are "just a bunch of kids performing the cyber equivalent of toilet-papering someone's house."²¹⁹ But who is really hurt by cyberterrorism? Think about it,

"[i]t would cost the average Bangladeshi more than eight years' income to buy a computer, whereas it would cost the average American just one month's wage. . . [a]nd what would this repository of information, in which more than 80% of the content is in English, mean to 90% of people worldwide who do not speak it."²²⁰

IV. CONCLUSIONS

Terrorism is not new; however, today it is different than it has been in the past. The same elements may still be present, but new ones have emerged that add to the threat. Terrorism began as "freedom fighters" fighting for their liberation, self-termination, or social/political cause. It has evolved to be a political weapon. Whenever an individual has an issue, instead of taking the legal means to solve it he/she turns to terrorism and destroys lives and property. What does this honestly solve? Nothing.

In the earlier days of terrorism, one could expect a suicide mission, a car bomb, or hijacking. Today, the sky is the limit. With terrorists amassing great fortunes of wealth and the ability to acquire weapons of mass destruction, there is no telling what today's terrorists will try. Actually, weapons are not even needed anymore. Today, with a computer, terrorists can accomplish almost anything. What is worse is that cyberterrorism is sure not to be the final version of terrorism. Just as terrorism evolved from hijackings, bombs, and suicide missions to chemical, biological, or even nuclear means, cyberterrorism seems to be the next step in this evolving terrorist arsenal and who knows what the world will be facing.

But for now, the world needs to concern themselves with the implications of cyberterrorism and be ready for any situation that occurs. To do this effectively is going to require a global commitment and right now that does not seem to be the case. Despite the fact that world leaders and nations have come out against terrorism, there are still places in the world that provide a safe haven for these individuals and organizations and as long as these places exist, terrorism will survive.

219. Abreu, *supra* note 159 (noting that this is not as serious as other cyber attacks that could be waged).

220. *Supra* note 152 (quoting Deputy Prime Minister Datuk Seri Abdullah Ahmad Badawi).

V. ADDENDUM

Since this paper was written a lot has changed in the world but this section is going to focus on the events of September 11th. I think that one would be hard pressed to find an individual who anticipated the events of September 11th. Most people in this country, actually in the world for that matter, never expected someone to attack the mainland of the United States because many thought that the United States was indestructible. That is no longer the case. Everyone is beginning to understand that the United States is just as vulnerable as any other nation in the world. As a result, a lot of security measures have been implemented and terrorism is beginning to be taken more seriously by everyone.

Let us begin with the new anti-terrorism legislation, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, that passed Congress with enormous speed. The goal of this legislation is to deter and punish terrorist acts in the United States and abroad.²²¹ The USA Patriot Act of 2001, as it is also known, will achieve its goals through law enforcement's and intelligence agencies' expanded roles. These organizations have been authorized to expand telephone tapping, monitoring of Internet traffic and conducting other surveillance in pursuit of terrorists.²²² This bill also includes provisions to combat money laundering.²²³ Another new measure provided for in this legislation is expanded information sharing among agencies,²²⁴ including allowing the FBI to have access to private records.²²⁵ The bill also extends the statute of limitations for terrorist acts while strengthening

221. *Bill to Combat Terrorism Contains Money Laundering Provisions: USA Act of 2001*, ANDREWS' BANK & LENDER LIABILITY LITIG. REP., Oct. 18, 2001. See also *Legislative Activity Veers Toward Border Control, Scrutiny of Aliens*, INTERPRETER RELEASES, Oct. 1, 2001, at 5 (listing several other goals of this legislation as "strengthening domestic security, updat[ing] and enhancing surveillance procedures, stopp[ing] financial support for terrorists, tighten[ing] security along the Canadian border, provid[ing] for greater criminal history information sharing with the State Department and the INS, remov[ing] personnel obstacles to investigating terrorism, protect[ing] victims of terrorism, increas[ing] information sharing for critical infrastructure protection, strengthen[ing] criminal laws against terrorism, and regulat[ing] biological weapons").

222. Dan Eggen, *Ashcroft Stands Tough on Tactics*, WASH. POST SERVICE, Oct. 26, 2001, available at 2001 WL 29164803.

223. *Bill to Combat Terrorism Contains Money Laundering Provisions: supra* note 221 (noting that this applies to private banking and correspondent banking by United States financial institutions on behalf of offshore banks and foreign nationals).

224. Ann McFeatters, *Bush Signs Antiterrorism Bill Into Law*, CNN.com, Oct. 26, 2001, at <http://www.cnn.com/2001/US/10/26/rec.bush.antiterror.bill/index.html>.

225. Ann McFeatters, *Bush Signs Anti-Terror Bill Says Tough Law Will Preserve Constitutional Rights*, PITTSBURGH POST-GAZETTE, Oct. 27, 2001 at A6.

penalties for those who assist terrorists.²²⁶ In addition to this, immigrants suspected of terrorism or aiding terrorism can be detained for up to a week without being formally charged or deported for simply raising money for a terrorist organization.²²⁷ At the last minute, another provision was inserted that would require all schools to report on the status of their foreign students.²²⁸

This legislation also creates a counterterrorism fund in the Treasury Department to reimburse "the Justice Department for the cost of countering, investigating and prosecuting domestic or international terrorism."²²⁹ The bill also extends the period in which electronic surveillance can be performed on a non-United States person along with roving surveillance on telephones used by suspected terrorists.²³⁰ A final provision would allow the government to detain suspected terrorists for seven days without bringing formal criminal or immigration charges.²³¹

This bill did not receive unanimous approval. In the Senate, Senator Russell Feingold (D-Wis.) voted against the measure. His biggest contention against the bill was the secrecy of searches and surveillance.²³² Not all of the provisions were hailed as breakthroughs in the fight against terrorism. Many organizations voice opposition based on civil liberties, specifically privacy and individual rights.²³³ David Cole, an expert on Constitutional law teaching at the Georgetown University Law Center, believes that this legislation is simply too "sweeping."²³⁴ Mr. Cole fears that law-abiding non-citizens will be deported simply because of "guilt by association."²³⁵ He went on to state his reservation to the provision allowing the attorney general to place immigrants in custody based on

226. *Id.*

227. McFeatters, *supra* note 225.

228. Siobhan Gorman, *Tracking the Foreigners Among Us*, NAT'L J., Oct. 27, 2001.

229. *Bill to Combat Terrorism Contains Money Laundering Provisions: USA Act of 2001*, *supra* note 221.

230. *Id.*

231. *Id.*

232. Robert E. Pierre, *Wisconsin Senator Emerges as a Maverick; Feingold, Who Did Not Back Anti-Terrorism Bill, Says He Just Votes His Conscience*, THE WASH. POST, Oct. 27, 2001, at A8 (acknowledging that he originally supported the Attorney General's position but had to change his mind because he feels that the legislation takes away too many freedoms).

233. Manuel Perez-Rivas, *Anti-Terrorism Proposals Worry Civil Libertarians*, CNN.com, Sept. 25, 2001, at www.cnn.com/2001/us/09/25/inv.civil.liberties/index.html (listing these provisions as though dealing with the detention and deportation of immigrants, the expansion of the government's wiretapping authority, and the easing of grand jury secrecy laws).

234. *Id.*

235. *Id.*

suspicion without an ounce of evidence.²³⁶ There has also been criticism expressed by privacy groups who believe that this legislation provides too much power to the government to monitor online communications.²³⁷

President Bush responded to this criticism by saying that "the bill protects, rather than erodes, civil liberties by increasing federal authorities' ability to prevent, rather than just respond to terrorist attacks."²³⁸ A sunset provision was also included in the bill to appease civil liberties organizations, providing an expiration of 2004 for many of the major provisions and dictating that the Justice Department prepares a report of how civil liberties are impacted.²³⁹ Professor Jesse Choper, a Constitutional Law Professor at the University of California at Berkeley, points out that the federal government has every right to pull back individual rights to protect national security interests.²⁴⁰

Another bill to pass both Houses of Congress quickly was the anti-money-laundering bill. This was passed after President Bush froze the assets of an original twenty-seven individuals and organizations and another thirty-nine suspected accounts.²⁴¹ One of the reasons it is so important to freeze assets, is that an organization or individual does not have the means to execute their plan.²⁴² This bill contains three main provisions. First, the United States Treasury Department would gain the power to single out foreign countries or banks suspected of money laundering. Second, the securities industry would be required to report suspicious transactions, and finally it would be illegal to bring more than

236. *Id.*

237. *Id.* (noting that these groups are also afraid that grand jury secrecy rules would be loosened while restrictions on searches would be eased as well).

238. McFeatters, *supra* note 224.

239. McFeatters, *supra* note 225 (establishing a way to also sue the government if personal data is disclosed in a harmful manner).

240. Jess Bravin, *Senate Sends Antiterrorism Bill to Bush*, THE WALL ST. J., Oct. 26, 2001, available at 2001 WL-WSJ 29676046.

241. *The Money Trial*, THE ECONOMIST, Oct. 26, 2001. Along with freezing the assets of individuals and organizations President Bush's plan also authorized the freezing of assets belonging to banks that do business with terrorists and those who did not cooperate with the American probe. See also Manuel Perez-Rivas, *Investigators making progress in 'worldwide puzzle'*, Oct. 2, 2001, available at www.cnn.com/2001/us/10/02/inv.investigation.status/index.html (indicating that over \$6 million dollars of terrorist accounts have been frozen, including thirty al-Qaeda accounts in the United States and an additional twenty overseas). See also *Money Laundering: Japan Freezes \$750,000 in assets of Taliban, Affiliates, Ministry Says*, INT'L BUS. & FIN. DAILY, Oct. 23, 2001. (pointing out that Japan has frozen \$750,000 assets contained in thirty-one deposit accounts thought to belong to the Taliban and affiliated individuals and organizations).

242. *The Money Trial*, *supra* note 241. (indicating that it is estimated that it only cost \$200,000 to execute the September 11th attacks).

\$10,000 cash into the United States.²⁴³ However, people acknowledge this bill may not be able to prevent Osama bin Laden from accessing his money. Money laundering normally involves dirty money, whereas he is able to engage in clean money.²⁴⁴

The Keeping America Safe Act of 2001 focuses on aliens and how the United States government would deal with them post-September 11th. Rep. Robert E. Andrews (D- NJ) introduced legislation that would amend the Immigration and Naturalization Act (INA) § 212(a)(3)(B)(i)(IV)(V) and (iii)(IV)(V) to provide for “the inadmissibility of aliens who aid or abet a terrorist organization, including those designated as foreign terrorist organizations pursuant to INA § 219, or aid and abet an individual who has conducted, is conducting, or is planning to conduct a terrorist activity.”²⁴⁵

Another act that focuses on aliens is the Criminal Alien Visa Denial Act of 2001, introduced by Rep. Christopher Shays (R-Conn.). This Act provides for a coordinated effort between the United States State Department and the INS to share access to United States criminal databases before an alien is allowed to enter the country.²⁴⁶ The interaction between the State Department and INS may be expanded with the passage of Senator Edward M. Kennedy’s (D-Mass.) bill. It would provide electronic access for both the State Department and INS to criminal history records held by the Federal Bureau of Investigation (FBI) to determine whether a visa applicant has a criminal history.²⁴⁷

Besides being concerned with aliens, Congress has also been busy providing for the armed services. In a House defense authorization bill Congress allocated \$343 billion to the armed services to help with border

243. *Id.*

244. *Id.* (describing dirty money as the proceeds from say drug trafficking going through the financial system as a way to make it look clean whereas clean money is harder to track because it normally consists of money that has been donated to a charity and later used for criminal endeavors).

245. *Legislative Activity Veers Toward Border Control, Scrutiny of Aliens*, INTERPRETER RELEASES, Oct. 1, 2001, at 1528 (acknowledging that the amendment would also amend § 237(a)(4)(B) to “provide for the deportation of those aliens deemed inadmissible under the new § 212(a)(3)(B)(i)”).

246. *Id.* (explaining the importance of this measure by citing an example of how an alien can enter the United States, commit a crime, leave, and get permission to reenter from the United States State Department without being detected because previously the State Department could not access the National Crime Information Center [hereinafter NCIC] database).

247. *Id.* (indicating that this would amend INS § 105 by making it easier to obtain these records, whereas in the past there were many regulations standing in the way of the information sharing requested).

patrol efforts.²⁴⁸ Not everyone supported this legislation however. Reps. Solomon Ortiz (D-Tex.) and Silvestre Reyes (D-Tex.) opposed this amendment arguing that military training does not automatically equate to border patrol and that they are already understaffed.²⁴⁹ Rep. Sheila Jackson Lee (D-Tex.) also pointed out that this legislation might be unconstitutional because it allows military personnel to serve in a civil law enforcement capacity.²⁵⁰ Along with increased spending for defense, there is also a bill pending regarding aviation security. The bill seeks stationing federal marshals on flights, along with increasing cockpit security and training pilots to handle hijacking situations.²⁵¹

With Congress passing so much legislation President Bush has also asked them to push ratification of two treaties currently stalled in the Senate. The first is the International Convention for the Suppression of Terrorist Bombings, which would require prosecution, or extradition of any individual involved in a terrorist bombing within their jurisdiction.²⁵² The second Convention is the International Convention for the Suppression of the Financing of Terrorism and refers to raising or collecting money to sponsor terrorist activities instead of bombings.²⁵³

Besides legislation aimed at strengthening terrorism prevention there has also been the creation of various offices, agencies and task forces. One is the Office of Homeland Security. According to White House Spokesman Ari Fleischer, Tom Ridge²⁵⁴ is expected to "craft a coordinated, integrated and comprehensive national strategy to combat domestic terrorism."²⁵⁵ Mr. Ridge is expected to have complete authority over the planning process, and budget authority over federal terrorism and security

248. *Id.* (noting that this is an amendment to the National Defense Authorization Act for Fiscal Year 2002 and put forward when it was discovered that some of the terrorists had entered the United States from Canada. "If 300,000 illegal immigrants trying to find a better life can gain access to America, do not believe for one moment that a larger contingent of people with evil intentions could not gain entry," Rep. Jim Traficant [D-Ohio], the one who introduced the amendment).

249. *Id.*

250. *Legislative Activity Veers Toward Border Control Scrutiny of Aliens*, *supra* note 245 (indicating that this may violate the posse comitatus prohibition of USC Title 10).

251. *Bush touts House aviation security measure*, Oct. 27, 2001, at <http://www.cnn.com/2001/US/10/27/rec.bush.airlines.index.html>.

252. *Id.* (explaining that this Convention was signed January 1998 and sent to the Senate in September of 1999 where it still remains).

253. McFeatters, *supra* note 224.

254. President Bush's new Director to head up the White House Office of Homeland Security.

255. Katherine McIntire Peters, *The War at Home*, govexec.com, Nov. 1, 2001, available at <http://www.govexec.com/features/1101/1101s2.htm>.

programs.²⁵⁶ In the beginning he needs to establish a clearinghouse in a secure location for monitoring terrorist activity and managing the government's response in the event of an attack.²⁵⁷ However, this agency would not have military authority or intelligence gathering capabilities.²⁵⁸ There are some that believe establishing another office is not the answer. Instead of a coordinator some argue that a security Czar would be better.²⁵⁹

The Combating Terrorism Technology Task Force (CTTTF) is another creation resulting from September 11th. This task force was established September 19, 2001 and is charged with developing an integrated plan to coordinate efforts in the field.²⁶⁰ Another group to be established was the Foreign Terrorist Asset Tracking Centre on September 14, 2001 charged with tracking terrorist finances.²⁶¹ Along with tracking terrorist finances, President Bush wants to establish a Foreign Terrorist Tracking Force that would be assigned the role of tightening restrictions on immigration.²⁶²

A task force like the above mentioned example, is needed to track foreigners as they enter this country. There are 300 checkpoints in which individuals can enter the United States.²⁶³ To illustrate the importance of tracking, take Ahmed Alghamdi for example. He was a student who legally entered the United States on a student visa but thereafter disappeared. INS had no idea where he was until September 11th when he hijacked a plane and crashed it into the south tower of the World Trade

256. *Id.*

257. *Id.*

258. *Id.*

259. Richard Forno, *Homeland Cyber Security – We Need a Czar, Not a Coordinator*, Oct. 23, 2001, available at <http://securityfocus.com.columnists/32>. (“defining a Czar as a single, knowledgeable leader who understands the issues of ‘cyber-security’ and who has the real power to enact and enforce security laws in a climate of immediate and effective action”).

260. *US examines new counter-terrorist technologies*, INT’L DEF. REV., Nov. 1, 2001. (establishing connections with warfighting commanders-in-chief and organizations responsible for homeland security along with other security-related agencies within the United States and abroad).

261. *The Money Trial*, *supra* note 241 (noting that this task force was actually created over a year ago but did not begin operations until after the September 11th attacks).

262. *Tighten U.S. Immigration Rules*, AP, Oct. 30, 2001. (indicating that the goal of the task force would be to coordinate with other federal agencies to prevent terrorists from entering the United States). See also Somini Sengupta, *U.S. Doors Indefinitely Closed to Refugees*, N.Y. TIMES SERVICE, Oct. 30, 2001. (indicating that the United States is not only watching immigrants but also refugees. Until further notice the borders will be closed to all refugees).

263. Gorman, *supra* note 228 (stating that United States borders are crossed 500 million times a year with thirty-one million nonimmigrant people crossing annually with three to four million visitors remaining after their visas have expired).

Center.²⁶⁴ As a result of this there has been a call for national identification cards and automated entry and exit systems at all major border checkpoints.²⁶⁵ INS Commissioner James Ziglar has promised to unveil an automated entry-exit system at all United States airports by 2003.²⁶⁶

When the United States decided to begin a campaign to eradicate the Taliban from Afghanistan and a counterterrorist offense against the al-Qaeda network President Bush declared that "either you are with us, or you are with the terrorists."²⁶⁷ It seems that many nations of the world heeded his declaration and have joined the battle. Even the internationally recognized President of Afghanistan, Burhanuddin Rabbani, has publicly supported President Bush's air strikes against his own nation.²⁶⁸ The first nation to side with the United States was Great Britain. Prime Minister Tony Blair has committed 200 Royal Marine commandos to standby on ships in the Indian Ocean with an additional 400 placed on "high readiness".²⁶⁹ Prime Minister Blair went on to state that the action was necessary to prevent Osama bin Laden from acquiring "chemical, biological, even nuclear weapons of mass destruction."²⁷⁰ Prime Minister John Howard of Australia has also pledged 1,500 defense personnel to join the United States in its war against Afghanistan.²⁷¹ Germany has pledged

264. *Id.* (pointing out that nine of the other seventeen hijackers had valid visas while six are unaccounted for).

265. *Id.* (crediting the national ID card to Senator Feinstein (D-Calif.) and the border system to Senator Edward Kennedy (D-Mass.) and Senator Sam Brownback (R-Kan.)). Senators Kennedy and Brownback are also interested in making it harder to falsify or misuse immigration documents, establish a tracking system through the schools where these individuals are supposedly registered, and create a way for the State Department, INS, and intelligence agencies to share information about suspected terrorists.

266. *Id.*

267. Tamara Makarenko & Daphne Biliouri, *Central Asian States Set to Pay the Price of US Strikes*, JANE'S INTELLIGENCE REV., Nov. 1, 2001, available at 2001 WL 1012441 (calling his initiative Operation Enduring Freedom and launching it October 7, 2001).

268. *Afghan President Supports Escalated Airstrikes*, at CNN.com, (Oct. 27, 2001) (stating that this is the best way to eradicate terrorists).

269. Michael Dobbs, *Afghanistan*, WASH. POST SERVICE, Oct. 27, 2001, at A19. (indicating that this was "a huge responsibility" that was needed to "defend civilized values around the world.")

270. *Id.* (noting that "if they are allowed to carry on like this, our world will be an insecure, unsafe place, and there will be no corner of the world – particularly not a place like Britain – that will be untouched by that.")

271. *Regional Briefing*, 164 FAR E. ECON. REV. 43 at 14 (Nov. 1, 2001).

an additional 35,000 troops for the "war against terrorism"²⁷² while Canada has pledged six warships, six planes and a total of 2,000 personnel.²⁷³

Although Great Britain was the first nation to provide assistance, the first world leader that President Bush spoke to was Russia's President Putin.²⁷⁴ There are several reasons why Russia would want to side with the United States. First, Russia does not want to see radical Islamic elements extend into Central Asia.²⁷⁵ Secondly, the United States along with the European Union have relaxed their opposition to Russia in criticism of their handling of Chechnya.²⁷⁶ However, there are several Russian military leaders who do not think that this cooperation is a good idea, arguing that Russia should be more concerned about Iraqi's security than the United States'.²⁷⁷ As a result, President Putin has stated that Russian airspace can only be used for humanitarian missions.²⁷⁸

Since September 11th, Japan has undergone a remarkable transformation in military presence. As a result of World War II, Japan had severe restrictions as to what sort of military operations it could conduct. But that may all change very soon. At the end of October, Japan approved a measure authorizing Japanese military support to the United States led anti-terror campaign. This could pave the way for Japanese troops to be sent overseas, however, they would not be permitted to engage in combat.²⁷⁹ The legislation also allows the Japanese military to

272. Christoph Bluth, *Germany Considers 'was on Terror Role*, JANE'S INTELLIGENCE REV., Nov. 1, 2001, available at 2001 WL 10122422 (indicating that Special forces could also be sent).

273. *Parliament Authorizes Japan Support Troops*, AP, Oct. 30, 2001; see also, Hans Greimel, *Japan Passes Law to Join Terror War*, LOS ANGELES TIMES, Oct. 29, 2001.

274. Timothy J. Colton & Michael McFaul, *America's Real Russian Allies*, FOREIGN AFF., Nov. 1, 2001, at 46. (noting that many believe that Russia came to the United States' side so quickly as a way for President Putin to later link the United States' stand against terrorism with their own battle against Chechn rebels).

275. Makarenko and Biliouri, *supra* note 267.

276. *Id.*

277. Colton and McFaul, *supra* note 267 (recognizing however that the Russian people support the United States in part of a deep support of democracy).

278. Makarenko and Biliouri, *supra* note 267. (indicating that he believed the way to eradicate terrorism was by "tackling poverty, international conflicts and other problems that have been correlated with the rise of terrorist groups").

279. *Parliament Authorizes Japan Support Troops*, *supra* note 273; see also, Hans Greimel, *Japan Passes Law to Join Terror War*, LOS ANGELES TIMES, Oct. 29, 2001. (pointing out that Japan may begin transporting weapons and ammunition in the war against terror in the air or on the high seas but not on foreign soil).

guard United States bases on Japanese soil along with permitting their coast guard to fire on suspicious vessels.²⁸⁰

Another country to pledge support to the campaign against terrorism has been China. Its President, Jiang Zemin, said that he condemns all terrorism and would support the United States' attack against Afghanistan and the Taliban as long as it was directed at military targets and not the Afghan people or Islam in particular.²⁸¹ He went on to add that China and the United States, as major influences in the world, have a responsibility to protect peace and stability in the Asia-Pacific region and the world.²⁸² There is speculation however that the attacks in Afghanistan could destabilize neighboring Central Asian States and make it easier for authoritarian rule to rise along with an increase in indigenous Islamic militance.²⁸³ The irony is that Central Asian States have been seeking Western support in their battle against terrorism and until September 11th their voices were ignored.²⁸⁴ However, now they have a strategic advantage over the United States who could use their locations for President Bush's "sustained and relentless" terrorism campaign.²⁸⁵

Uzbekistan's President, Islam Karimov, has stated that he would cooperate "[i]f investigation[s] proves that the terror attacks had been prepared on the territory of Afghanistan," indicating that "there must be retribution."²⁸⁶ The current state of dialogue between the two nations would allow the United States access to Uzbekistan airspace and airbases along with an exchange of intelligence.²⁸⁷ In return for this concession, the United States has agreed to target Afghanistan training camps that trained members of the IMU (Islamic Movement of Uzbekistan).²⁸⁸

Tajikistan is also getting involved in the campaign to eradicate terrorism. Prior to September 11th, the President of Tajikistan, Imamali

280. *Parliament Authorizes Japan Support Troops*, *supra* note 273; *see also*, Greimel, *supra* note 279.

281. John Hill, *China Sides With USA*, JANE'S INTELLIGENCE REV., Nov. 1, 2001, available at 2001 WL 10122415.

282. *Id.*

283. Makarenko & Biliouri, *supra* note 267.

284. *Id.* (pointing out that these nations have been asking for help since the Islamic Movement of Uzbekistan (IMU) conducted its first wave of terrorism in Kyrgyzstan and Uzbekistan back in 1999).

285. *Id.*

286. *Id.* (recognizing that Uzbekistan would be an ideal nation to have on the United States' side because of its strategic location allowing for sustained attacks on terrorist training camps and Taliban installations within Afghanistan).

287. *Id.* (limiting its missions to humanitarian and search-and rescue operations).

288. Makarenko & Biliouri, *supra* note 267.

Rakhmonov, had supported counterterrorism measures in the Commonwealth of Independent States and Central Asia, making it seem that he would join in the efforts of the United States.²⁸⁹ President Bush believes that Tajikistan could be beneficial in the campaign to arm the Taliban opposition by utilizing routes through the country that have been previously used by Russia and its allies to aid the Northern Alliance, the opposition force against the Taliban.²⁹⁰

Lebanon is also supporting the anti-terrorism campaign. They have pledged their support and stationed additional troops at embassies and other interests of countries supporting the campaign.²⁹¹ Along with additional troops, Lebanon has staged drills to practice for various hijacking situations.²⁹² It is not just individual nations that are supporting the campaign against terrorism; there are also global organizations that are aiding in the effort. The Asia-Pacific Economic Cooperation Forum is one such organization.²⁹³ However, not all nations or organizations are in support of Operation Enduring Freedom. The only involvement that Iran will have in the campaign is to continue supplying the Northern Alliance because it does not support military retaliation by the United States.²⁹⁴

Nations around the world are not just aiding the United States. They are also passing legislation back home to strengthen their own terrorism laws. Surprisingly this includes laws regarding cyberterrorism. The European Union (EU) in conjunction with the Council of Europe (COE) have proposed cybercrime legislation in an attempt to prevent the "misuse of the Internet."²⁹⁵ The COE has also received support from all fifteen EU countries on the world's first international agreement on crimes committed

289. *Id.* (acknowledging however that their support may be minimal and hidden due to the lack of border control and factionalism).

290. *Id.* (noting however that border issues have to be discussed because as the campaign against Afghanistan intensifies many refugees will be leaving Afghanistan via Tajikistan).

291. *Beirut Demonstrates Will to Fight Terror With Drill*, Oct. 26, 2001.

292. *Id.*

293. *Regional Briefing*, *supra* note 271 (acknowledging their statement condemning terrorism along with calling for heightened security for telecommunications and transport and promised "appropriate financial measures" to stop terrorist funding).

294. Makarenko & Biliouri, *supra* note 267 (noting that Iran believes that any terrorist campaign against Afghanistan should also include a war on drugs). *See also U.S. Sees Broader Role in Colombia as Part of Anti-Terror Fights*, Oct. 26, 2001 (pointing out that the United States' war on terrorism has expanded beyond Afghanistan and Osama bin Laden. The United States has pledged counterterrorism aid to Colombia in addition to military aid to assist in their war on drugs).

295. *Computer Crime: In Wake of September 11 Attacks, EU, COE Move Closer to Approving Cybercrime Rules*, INT'L BUS. & FIN. DAILY, Oct. 2, 2001. (acknowledging however that the European Parliament is concerned about jurisdiction and privacy rights conflicts).

in cyberspace.²⁹⁶ The Convention calls for the parties to “cooperate . . . to the widest extent possible” in investigation and prosecution of computer related offenses along with the “collection of electronic evidence of a criminal offense.”²⁹⁷ Germany is also looking to pass local legislation that would make it easier to use informants in criminal prosecutions along with requiring fingerprints for passports and identity cards.²⁹⁸

Since the September 11th attacks, attitudes towards money laundering have changed. The American government along with other nations and organizations now acknowledge the tracing of money and restricting its flow to terrorist groups are key elements in the war against terrorism.²⁹⁹ Following these attacks sixty-six countries have introduced legislation to block the assets of organizations identified by the United States as terrorist in nature.³⁰⁰ While many nations are strengthening their money laundering laws, Italy has actually become more lax with the passage of legislation making it more difficult to investigate cross-border financial flows.³⁰¹

It is not just nations that are looking at these laws, multinational organizations are also amending their provisions regarding money laundering. As a way to combat money laundering the Organization for Economic Cooperation and Development (OECD) held an emergency meeting to look at the financing of terrorist groups.³⁰² The Basel Committee on Banking Supervision released previously prepared guidelines on the subject.³⁰³ The Asian-Pacific Economic Cooperation forum also indicated that it would tighten its money-laundering laws while the

296. *Id.* (referring to the agreement as the European Cybercrime Convention and also indicating that there might be problems passing the legislation if separate approval is required from the EU and national ratification).

297. *Id.* (listing offenses that must be criminalized – computer related forgery, computer-related fraud, content related offenses like child pornography on the Internet along with intellectual property right infringements).

298. Bluth, *supra* note 272 (noting that this was done after it was learned from FBI intelligence that many of the terrorists involved in the September 11th attacks had resided in Germany before coming to the United States for flight school).

299. *The Money Trial*, *supra* note 241.

300. *Id.* (acknowledging that the United Arab Emirates and Saudi Arabia are among the sixty-six nations, which is crucial because a lot of money that finances Osama bin Laden’s al-Qaeda network is believed to have originated in these countries). See also, *Money Laundering: France Moves to Freeze Financial Assets of Terrorist Organizations Listed by U.S.*, INT’L BUS. & FIN. DAILY, Sept. 27, 2001 (pointing out that France was the first nation to comply with President Bush’s bid to curb the money flow by groups linked to the September attacks. Between September 11-26th France had frozen \$3.9 million in bank accounts).

301. *Id.*

302. *Id.*

303. *Id.*

European Union indicated that it would broaden its efforts to prevent laundering earned or used in all serious crimes.³⁰⁴ The United Nations Security Council also passed a money-laundering provision.³⁰⁵

Along with the money laundering legislation that Congress passed the United States has implemented Operation Green Quest to target underground money transfers.³⁰⁶ It will be housed in the United States Customs Service headquarters and staffed by financial crime investigators from the Treasury and Justice Departments.³⁰⁷ This operation will hopefully reveal new information on sources of terrorist funding and systems similar to *hawala*, a way to evade legal banking systems by transferring money from one source to another via different countries.³⁰⁸ In the beginning, the operation is slated to focus on illicit charities, counterfeiting, credit card fraud, fraudulent export and import schemes, drug trafficking, and cash smuggling.³⁰⁹

Many experts around the world believe that the events of September 11th were the work of Osama bin Laden and the al-Qaeda network. There is debate not only as to whether he is in fact the mastermind behind these attacks but also what should be done to him if he is in fact responsible. Some say that there should be no trial and he should just be killed as soon as he is apprehended.³¹⁰ Others believe that he should be put on trial in the United States as a way to prove that the American system of justice can still function in times of adverse circumstances.³¹¹ But does anyone believe that any courtroom in the country could pull together an unbiased jury to try him?

304. *Id.*

305. *Money-Laundering: Security Council Passes Resolution Outline Strategy to Combat Terrorism*, INT'L BUS. & FIN. DAILY, Oct. 2, 2001 (outlining its provisions as a "multi-faceted strategy, including criminalization of funding for terror attacks and freezing of assets for anyone who facilitates such acts").

306. *Customs Service Goes After Terrorist Funding*, Oct. 25, 2001, available at www.cnn.com/2001/US/10/25/inv.terrorist.funding/index.html. (indicating that this refers to the "hawala" system concentrated in the Middle East and South Asia).

307. Rob Garver, *Terro-Fund 'Quest' From Treasury*, AM. BANKER, Oct. 26, 2001, available at 2001 WL 26574662 (quoting Treasury Deputy Secretary Kenneth Dam as saying that the "operation's objective is to 'launch comprehensive investigations resulting in blocking orders, criminal prosecutions, civil and criminal forfeitures, and other actions'").

308. *Customs Service Goes After Terrorist Funding*, *supra* note 306.

309. *Id.*

310. Henry Weinstein, *A Trial Too Big for U.S.?: Trying Osama Bin Laden, if He's Ever Caught, Could be a Showcase for American Principles or a Platform for His Extremist Views. Some See a Security Nightmare*, LOS ANGELES TIMES, Oct. 26, 2001, at 2001 WL 28923653.

311. *Id.* (pointing out that this may not be the safest way to go because there is no guarantee that United States citizens would be safe in the same courtroom as Osama bin Laden).

The debate over a trial has emerged as a result of President Bush calling for Osama bin Laden's capture. Both United States and international law would call for a trial if he was in fact apprehended.³¹² If Osama bin Laden was tried in the United States, any city in which the flights originated could serve as proper venue along with where the flights crashed or even where the pilots trained or opened bank accounts.³¹³ If however, it was decided that Osama bin Laden would be tried overseas, according to a hijacking convention adopted thirty years ago, he could be tried in any of the eighty nations who lost citizens in the attack.³¹⁴ Some argue that an international trial would be more appropriate because of the international cooperation that exists to handle the situation.³¹⁵ The United Nations Charter would provide another path. Chapter 7 provides the Security Council with authority to create special courts when peace and security are threatened.³¹⁶ A problem with all of these solutions is that it provides Osama bin Laden with a public forum. Not only could he recruit more followers but also classified information could be revealed that would compromise United States intelligence sources.³¹⁷ Osama bin Laden has spoken once publicly since the events of September 11th. He was quoted as saying that "America will not live in peace' unless the United States withdraws its troops—'the army of infidels'—from Saudi Arabia and ceases its support for Israel."³¹⁸

Prior to the attacks as previously indicated in this paper, Osama bin Laden has been known to keep in contact with his followers via satellite phones and the Internet. Intelligence reports foiled a Paris Embassy plot masterminded by one of Osama bin Laden's cells. There it was determined that all communications regarding the plot were to be carried

312. *Id.* (indicating that if Osama bin Laden was captured and tried in the United States he could also be tried for the embassy bombings in Kenya and Tanzania where 224 people were killed and an additional 5,000 injured).

313. *Id.* (noting that there are persuasive arguments for trying Osama bin Laden in the United States. The attacks occurred on United States soil, violated numerous United States laws and most of the victims were United States citizens).

314. *Id.* (acknowledging that the Convention binds 175 signatory countries to prosecute hijackers and their accomplices or extradite them to countries that will).

315. Weinstein, *supra* note 310 (explaining that by trying Osama bin Laden in the United States it would "shift attention from the global nature of the attack" causing an "enormous" amount of "legitimacy, certainly in Muslim countries," Anne-Marie Slaughter, a professor of International Law at Harvard University).

316. *Id.* (noting that this is what was done to investigate the war crimes in Yugoslavia).

317. *Id.* (indicating that a way to avoid this would be to try him in a closed military tribunal).

318. *Id.*

out via coded messages hidden in pictures on the Internet.³¹⁹ However, since the September 11th attacks Osama bin Laden has been evading authorities by returning to “stone age” communication.³²⁰ Despite bin Laden’s return to the “Stone Age” it is still thought that his cells communicate via encrypted Internet messages.³²¹ Even if an encrypted message is discovered, there is little that can be done unless the government has access to a supercomputer and then there is usually not enough time to decrypt it.³²²

While Osama bin Laden may be going low-tech, the Federal Bureau of Investigation (FBI) is going high-tech. Since September 11th, the FBI has increased Internet surveillance and setup a website to monitor developments surrounding the plane attacks.³²³ However, despite the FBI’s increased cyber presence other federal agencies are scrutinizing their websites and removing any information that they believe would benefit a terrorist.³²⁴ No one is exactly sure what information is valuable but Attorney General Ashcroft pointed out that an individual in federal custody was discovered to have downloaded information on crop-dusting planes that could be used for biological or chemical attacks.³²⁵

Early in October, a government antiterrorism commission recommended that a cybercourt be established to prosecute hackers.³²⁶ Governor Gilmore³²⁷ believes “[a] court dedicated to criminal cyber conduct can develop the needed expertise to act appropriately on investigative activities while ensuring the protection of civil rights and liberties.”³²⁸ The court would sit in “secret” and possess special powers

319. Chris Hedges, *The Terrorist Who Lived Next Door*, N.Y. TIMES SERVICE, Oct. 27, 2001.

320. Daniel Sieberg, *Bin Laden Exploits Technology to Suit His Needs*, Sept. 21, 2001, available at www.cnn.com/2001/us/09/20/inv.terrorist.search-index.html. (indicating that instead of satellite-linked phones, mobile handsets, and Internet access he is now simply receiving emissaries and issuing orders in person).

321. *Id.* (noting that they use these methods to cover their tracks when sending e-mails and coordinating their movements).

322. *Id.*

323. *FBI hunts for attackers online*, Sept. 13, 2001, at www.cnn.com/2001/Business/asia/09/13/wash.fbiwebsite/index.html.

324. *Feds Remove Information From Web Sites*, AP, Oct. 25, 2001.

325. *Id.*

326. Anita Ramasastry, *FindLaw Forum: We Don't Need a Secret New 'Cybercourt' for Hackers: Why The Gilmore Commission's Recent Proposal Should Be Rejected*, at http://unit.news.findlaw.com/commentar/2001/024_ramasastry.html (recognizing the need based on the slowness of acquiring warrants to investigate online crime).

327. Governor of Virginia and Chairman of the Commission.

328. Ramasastry. *supra* note 326.

regarding search and surveillance.³²⁹ This court would be modeled after the Foreign Intelligence Surveillance Act (FISA) court.³³⁰ Some believe that a cybercourt goes to far and argue that instead of establishing a new court we should allow the existing courts to do their jobs. Over the years, courts have taken existing laws and applied them to technological advancements and many believe that they could do the same thing here.³³¹ An alternative suggestion would be to allow the existing FISA court to serve as the cybercourt as well since they both potentially involve national security issues.³³²

Since the September 11th attacks the United States has also been hit with an outbreak of anthrax. There is still debate as to where the anthrax is coming from with experts taking sides, arguing that it was either domestic or foreign in nature. Almost all experts admit that there has not been a direct link to any foreign organization. Although there is a report of Osama bin Laden buying \$10,000 worth of anthrax on the open market in Eastern Europe and South-East Asia.³³³ There is another report that his associates were able to obtain \$3,685 worth of anthrax from a factory supplied to the Indonesian-based Islamic Moro Front.³³⁴

Gerald Brown, a retired United States Air force anti-terrorism specialist believes that the anthrax is "homegrown."³³⁵ However, there are also those who believe that the letters were written by people who are not familiar with the English language or are unfamiliar with American

329. *Id.*

330. *Id.* (acknowledging that this court consists of a rotating membership of United States federal district court judges). There has been a lot of criticism from civil rights organizations regarding this court because it conducts its proceedings in secret and does not have to adhere to traditional Fourth Amendment guarantees. The purpose of the court is to deal with government surveillance and reviews Justice Department's requests for electronic surveillance and physical searches of individuals who are suspected to be national security risks. The point of contention is the fact that everything is done in secret, thus people would may not even know that their home was searched or their phone tapped. The defendant may not even have access to the reasons why they were subjected to a search and the resulting information may later be used in a criminal prosecution.

331. *Id.* (noting that judges have been able to apply the Fourth Amendment to global positioning devices and infrared heat sensors).

332. *Id.*

333. Katty Kay, *Bin Laden Link to 'Mail Order Germs,'* THE LONDON TIMES, Oct. 25, 2001, available at <http://www.thetimes.co.uk/article/0,2001350024-200137116,00.html> (suggesting that along with the anthrax Osama Bin Laden also acquired salmonella and e-coli from mail order factories).

334. *Id.*

335. Peter Slevin, *Are the Anthrax Letters Homegrown?*, WASH. POST SERVICE, Oct. 26, 2001, at A23.

handwriting.³³⁶ Although, there is also a theory that the letters were in fact written by a native English-speaker who is just trying to focus suspicion elsewhere.³³⁷ Or it could even be an individual trying to be childlike in nature.³³⁸ There is some speculation that Iraq is behind the anthrax letters as well but there has been no definitive link to this theory.³³⁹ Anthrax is also beginning to appear outside of the United States. On October 11th, numerous letters were received in Germany claiming to contain anthrax spores and an indication that the "jihad" had begun.³⁴⁰ Brazil, Argentina, and the Bahamas have also reported anthrax-contaminated letters.³⁴¹

It is hard to know what is going to happen from here but I think that it is safe to assume that life will never return to pre-September 11th existence. Whether this means that there will be a renewed patriotism or people living constantly in fear, one thing is certain; nothing will be overlooked or believed not to be possible. Hopefully, we have seen the worst but chances are there is more to come. It is time to be prepared.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Seeing the World Anew*, THE ECONOMIST, Oct. 25, 2001.

340. Bluth, *supra* note 272.

341. *The Anthrax Threat*, THE ECONOMIST, Oct. 26, 2001.

GRAMM-LEACH-BLILEY: THE EFFECT OF INTERIM RULINGS ON GERMAN BANKS

*Sarah Smith**

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I. INTRODUCTION

In 1933, the Glass-Steagall Act created a “complete divorcement” between commercial and investment banking.¹ Under this legislation, commercial banks were prohibited from engaging in the underwriting of securities.² In addition, the Bank Holding Company Act of 1956 restricted the ability of bank holding companies to enter into various business arenas or to purchase other banks.³ However, over the years, banks have found loopholes to expand their business and to avoid such banking regulations.

As the Glass-Steagall Act was diluted by numerous Federal Reserve Board rulings and bank activities, it became apparent that there was a need for new legislation.⁴ Glass-Steagall was out of date, and it was restricting United States banking institutions here and abroad by limiting commercial banks and their affiliates from engaging in investment opportunities. The Gramm-Leach-Bliley Act of 1999⁵ (“GLB”) repealed Glass-Steagall’s Section 20, which banned affiliations between member banks of the Federal Reserve and firms that were “engaged principally in the issue, flotation, underwriting, public sale, or distribution...of stocks, bonds,

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1. Jerry W. Markham, *Banking Regulation: Its History and Future*, 4 N.C. BANKING INST. 221, 223-85 (2000) (citing S. Rep. No. 73-1455, at 185 (1934)).

2. *Id.*

3. *Id.*

4. Markham, *supra* note 1.

5. Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

debentures, notes, or other securities,”⁶ and Section 32, which provided that “[n]o officer, director, or employee” of a company engaged principally in underwriting securities could concurrently serve “as an officer, director, or employee” of a Federal Reserve member bank.⁸

The Gramm-Leach-Bliley Act ratified what had already been accomplished through legal loopholes. GLB maintains the functional regulatory system as the basis for regulating the expanded activities of the banks and their holding company structures.⁹ This means that traditional commercial banking activities would continue to be regulated by the bank regulators and securities activities would be regulated by the SEC and state securities commissions. By eliminating prohibitions on affiliations between commercial banking, investment banking, and insurance companies, GLB is expected to initiate a new wave of mergers as securities underwriters, insurers, and banks combine to form more diversified financial services corporations.

Financial services have become increasingly globalized as of late.¹⁰ GLB has set the stage not only for a wide array of mergers and acquisitions domestically, but GLB also provides avenues for foreign banks to enter the United States financial services market and for United States financial companies to pursue interests in other countries.¹¹ However, the initial enactment of GLB was discriminatory against foreign banks electing to become financial holding companies in that GLB provided different standards for foreign and domestic applicants.

Since the enactment of GLB, the Federal Reserve Board has issued an interim ruling and several amendments to the interim rule that clarify the process of becoming a financial holding company.¹² This article will examine how these rulings affect German banks. The first section will describe the German banking system, which is a complex system of banking institutions and credit cooperatives. The second section will take a

6. 12 U.S.C. § 377 (1993) (repealed by Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999)).

7. 12 U.S.C. § 78 (1993) (repealed by Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999)).

8. Patricia A. McCoy, *The Gramm-Leach-Bliley Act of 1999*, at <http://www.bender.com/bender/open/webdriver?Mlval=chan&channelD=banking> (last visited Aug. 29, 2001).

9. L. Richard Fischer, *Financial Services Modernization 2001: Implementation of the Gramm-Leach-Bliley Act*, SF57 A.L.I.-A.B.A. 445 (2001).

10. *Id.*

11. McCoy, *supra* note 8.

12. Bank holding companies and change in bank control, 65 Fed. Reg. 3785 (Jan. 25, 2000); 65 Fed. Reg. 15053 (Mar. 21, 2000); 65 Fed. Reg. 16302 (Mar. 28, 2000).

closer look at the Glass-Steagall and Gramm-Leach-Bliley Acts. The third section will analyze the new regulations established by the Federal Reserve's interim ruling and amendments of Gramm-Leach Bliley, and how these rulings pertain to German banks wishing to become financial holding companies under GLB. This paper will show that the new regulations issued by the Federal Reserve Board will alleviate burdens the Act placed on German banks by equalizing the playing field between foreign and domestic entities.

II. STRUCTURE OF GERMAN BANKS

The German banking system varies significantly from that of the United States in form and permissible activities. It is, therefore, important to understand the structure of the German banking system before analyzing how United States laws affect foreign banks.

German banks offer a wide range of financial services, some of which are prohibited activities in the United States.¹³ There is no division between commercial and investment banking in Germany.¹⁴ Thus, the universal banking system allows banks to own equity in and/or control commercial, industrial, and insurance companies.¹⁵ As long as non-banking corporations are deemed "reliable" by the Bundesaufsichtsamt für das Kreditwesen (Federal Supervisory Authority), such corporations may own up to 100 percent of a banking corporation's equity interest.¹⁶

Banks in Germany have taken the role of initiators, advisers, and financiers of mergers and acquisitions.¹⁷ While all German banks have the power of universal banking, only a few actually underwrite securities.¹⁸ Instead, the German banking system is highly segregated. The banking industry is divided into three major sectors: public sector banks, cooperative banks, and private banks.¹⁹ The Genossenschaftsbanken, or credit cooperative sector, primarily deals with small business and

13. See generally Helen A. Garten, *Universal Banking and Financial Stability*, 19 BROOK. J. INT'L L. 159 (1993).

14. Hwa-Jin Kim, *Markets, Financial Institutions, and Corporate Governance: Perspectives From Germany*, 26 LAW & POL'Y INT'L BUS. 371 (1995).

15. *Id.*

16. Mark E. Nance & Bernd Singhof, *Banking's Influence Over Non-Bank Companies After Glass-Steagall: A German Universal Comparison*, 14 EMORY INT'L L. REV. 1305 (2000).

17. *Id.*

18. Kim, *supra* note 14.

19. James H. Freis, Jr., *An Outsider's Look into the Regulation of Insider Trading in Germany: A Guide to Securities, Banking, and Market Reform in Finanzplatz Deutschland*, 19 B.C. INT'L & COMP. L. REV. 1 (1996).

agricultural financing.²⁰ The *Geschäftsbanken* are private commercial banks.²¹ Finally, the *Sparkassen* and *Landesbanken*, which are public savings banks, maintain a majority of deposits and dominate the local market.²²

The group of credit associations, or *Genossenschaftsbanken*, is composed of local associations (*Volksbanken* and *Raiffeisenbanken*), their regional institutions (*Zentralbanken*), and a central institution (*Deutsche Genossenschaftsbank*).²³ The local credit associations are structured in the form of co-operatives. Banking services under the *Genossenschaftsbanken* were initially only accessible to members, who had set up the co-operatives as "self-made banks" to finance agricultural and industrial undertakings.²⁴ Their business today encompasses all types of financial services and is no longer limited to members. In regards to branching, the *Genossenschaftsbanken* constitute the most widespread banking group in Germany today, with a market share of approximately twenty-one percent.²⁵

The *Geschäftsbanken*, or private commercial banks, developed as the country industrialized in the nineteenth century.²⁶ The lack of an equity market capable of meeting the financial needs of emerging industrial enterprises forced Germans to turn to banks for capital. Thus, during the nineteenth century, banks and industry developed a close relationship.²⁷ In the twentieth century, these relationships were strengthened in the inter-war years, when banks were obligated to take stock as protection from financially troubled companies.²⁸ Following World War II, German capital markets were once again weakened. The reconstruction of the destroyed industry heavily depended upon the Marshall Plan, which poured a significant amount of United States' funds into Germany.²⁹ After initial allied plans to divide the large commercial banks into smaller entities were

20. *Id.*

21. *Id.*

22. *Id.*

23. Theodore Baums & Michael Gruson, *The German Banking System—System of the Future?*, 19 BROOK. J. INT'L 101 (1993).

24. *Id.*

25. Mance & Singhof, *supra* note 16, at 1355.

26. *Id.* at 1356.

27. *Id.*

28. *Id.*

29. *Id.* at 1356.

abandoned, the large commercial banks regained their prominent position within the German economy.³⁰

Currently, the private commercial banks are divided into four categories. These types consist of big branch banks (Großbanken), regional banks (Regionalbanken), private bankers (Privatbankiers), and the branches of foreign banks. Regional banks are organized either as stock corporations (Aktiengesellschaft-AG) or as limited liability companies (Gesellschaft mit beschränkter Haftung-GmbH).³¹ These regional banks maintain a nationwide network of branches with a concentration on a specific region.³² In contrast, private bankers comprise all banks organized as partnerships. Nearly all of these private commercial banks function as universal banks.³³ They, therefore, engage in all types of banking operations.³⁴ The private commercial banks comprise thirty-five percent of the commercial bank market share.³⁵

Sparkassen, or savings banks, are established by cities and incorporated under state public law.³⁶ Throughout German history, municipalities and counties considered the opportunity to earn interest on deposits (of any amount) to be part of their public welfare function.³⁷ In order to provide their citizens with this service, counties and cities formed Sparkassen. Savings banks focus on traditional banking services.³⁸ These services include the extension of commercial loans and the acceptance of deposits (that the depositor may withdraw upon demand).³⁹ Savings banks' operations are limited to the locality of the establishing municipality or district, under what is referred to as Regionalprinzip (or the "territorial principle").⁴⁰

30. Nance & Singhof, *supra* note 16.

31. The so-called "Big Three" (Deutsche Bank AG, Dresdner Bank AG, and Commerzbank AG) have become a party of four after the merger of Bayerische Hypotheken und Wechselbank and Bayerische Vereinsbank AG into Bayerische HypoVerinsbank. By the end of 2000, it was expected that there would be a party of three again as a result of a proposed merger between Dresdner Bank AG and Deutsche Bank. Even though this particular merger failed, other mergers of significance are likely to ensue. *Id.*

32. Nance & Singhof, *supra* note 16.

33. *Id.* at 1357.

34. See generally Garten, *supra* note 13.

35. Nance & Singhof, *supra* note 16, at 1357.

36. *Id.* at 1352.

37. *Id.*

38. *Id.*

39. *Id.*

40. Kim, *supra* note 14.

Like the majority of German banks, Landesbanken are universal banks engaging in both investment banking and commercial banking functions.⁴¹ In addition, Landesbanken invest in commercial and industrial ventures.⁴² Landesbanken are not corporations; instead, they are established under public law, and their obligations are guaranteed by the German States.⁴³

Landesbanken play a vital role in the German banking business and in the sector of international financial institutions.⁴⁴ One reason for this position is their close connection with their sponsoring state or political subdivision of a state.⁴⁵ Unlike commercial banks organized as entities under the general corporate law, the internal structure of Landesbanken is congruous with the requirements of their regulatory supervision.⁴⁶ Landesbanken are at a disadvantage to other German banking institutions in that it is more difficult for Landesbanken to create new capital.⁴⁷ However, Landesbanken provide a unique protection for all customers, whether as depositors, fund transfer customers, purchasers of securities, or other types of customers.⁴⁸ The Landesbanken's lengthy history of more than 100 years has demonstrated the fortitude of the public sector banking organization and has shown that the states and their subdivisions have benefited from the system of the Landesbanken.⁴⁹

The universal banks are valid throughout the European Union ("EU").⁵⁰ Each member state of the EU recognizes the banking license of the universal banks, subject to limitations. Since they are not hampered by restrictions on activities or by geographic limitations, some larger German banks are actively engaged in United States banking and capital markets.⁵¹ Bayerische Landesbank, Westdeutsche Landesbank, and Länderscreditbank

41. Michael Gruson & Uwe H. Schneider, *The German Landesbanken*, 1995 COLUM. BUS. L. REV. 337 (1995).

42. *Id.*

43. *Id.*

44. *Id.*

45. Gruson & Schneider, *supra* note 41, at 355.

46. *Id.*

47. See Gruson & Schneider, *supra* note 41.

48. *Id.*

49. *Id.*

50. Peter Q. Noack, *West German Bank Secrecy: A Barrier to SEC Insider-Trading Investigations*, 20 U.C. DAVIS L. REV. 609 (1987).

51. Nance & Singhof, *supra* note 16, at 1353.

Baden-Wurttemberg have all made public offerings of debt securities in the United States.⁵²

The EU has encouraged the proliferation of financial services abroad. As the world's third largest economic power, Germany has sought to expand its financial strength into other countries, primarily the United States.⁵³ However, as German financial institutions expand into different countries, the banks must comply with the laws of the various countries.

III. REGULATIONS ON UNITED STATES BANKING

Following the United States stock market crash of 1929, the Glass-Steagall Act was enacted.⁵⁴ Since it was thought that banks' involvement in the stock market was a contributing factor to the crash, the Act sought to divide commercial banking and investment banking in the United States.⁵⁵ By prohibiting banks from underwriting securities, the federal government sought to protect investors.⁵⁶ The law also prohibited affiliates of banks from being principally engaged in underwriting securities, and banned banks and securities firms from sharing board members and directors.⁵⁷

The United States entered into its worst depression after the stock market crash of "Black Thursday" on Wall Street, October 24, 1929. With more than 11,000 commercial bank failures from 1930 to 1933, the number of functioning commercial banks was reduced by more than forty percent from 25,000 to 14,000.⁵⁸ A quarter of the working population became unemployed by 1933.⁵⁹ Under the newly elected Roosevelt administration, Congress passed the Glass-Steagall Act in 1933, which prohibited commercial banks from engaging in securities transactions (the principal exception being that commercial banks were allowed to underwrite most government-issued bonds).⁶⁰ It was the prevailing belief that the cause for these bank failures and the stock market crash was the involvement of banks in securities transactions.⁶¹

52. *Id.*

53. Freis, *supra* note 19.

54. Markham, *supra* note 1.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Jonathan R. Macey, *The Business of Banking: Before and After Gramm-Leach-Bliley*, 25 J. CORP. L. 691 (2000).

60. See 12 U.S.C. § 24 (1994).

61. Adam Nguyen & Matt Watkins, *Financial Services Reform*, 37 HARV. J. ON LEGIS. 579 (2000).

Populist sentiment, not careful inquiry, encouraged the passage of the Glass-Steagall Act.⁶² In light of disclosures of disreputable practices and dishonest dealings with such banks as National City Bank, public mistrust of speculative securities dealings carried over into commercial banking. This hastened the enactment of the Glass-Steagall regulatory measures.⁶³ Some historians now attribute the bank failures to the Depression itself, which caused real estate and other values to fall, thus undermining bank loans.⁶⁴ Furthermore, these historians note that securities abuses played a minor role in the collapse of banks. There were few failures among the New York banks, which had the largest Wall Street operations.⁶⁵ Actually, the legislative history to the Glass-Steagall Act does not indicate that Congress blamed banks or their securities for the onset of the Great Depression, but instead, shows congressional concern with the relationship between commercial banks and their subsidiaries that underwrote securities, and the ability of the banks, through their subsidiaries, to dominate corporate underwriting.⁶⁶

Since the passage of the Glass-Steagall Act, banks and other financial service industries gradually chipped away at the restrictions between commercial and investment banking.⁶⁷ The banking industry pressed for almost two decades for the repeal of the Glass-Steagall Act and for changes to the Bank Holding Company Act ("BHCA").⁶⁸ Regulatory interpretation, cross-industry relationships, court rulings, and marketplace practices had an impact on the practicality of these two statutes, but no legislative action was taken.⁶⁹

The business of traditional banking and investment banking had converged prior to enactment of GLB.⁷⁰ In addition, banks were significantly involved in the insurance business through such sources of authority as "the place of 5000" exception to Section 92 of the National

62. Markham, *supra* note 1, at 237.

63. See Macey, *supra* note 59.

64. *Id.*

65. Laura J. Cox, *The Impact of Citicorp-Travelers Group Merger on Financial Modernization and the Repeal of Glass-Steagall*, 23 NOVA L. REV. 899, 902 (1999) (citing Modernization of the Glass-Steagall Act: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, 100th Cong. 57 (1987)).

66. J. Robert Brown, Jr., *The "Great Fall:" The Consequences of Repealing the Glass-Steagall Act*, 2 STAN. J.L. BUS. & FIN. 129, 138 (1995) (citing 75 Cong. Rec. 9887 (1933) and 75 Cong. Rec. 9904 (1933)).

67. *Id.*

68. *Id.*

69. *Id.*

70. Nguyen & Watkins, *supra* note 61.

Banking Act ("NBA"),⁷¹ and Section 24 (Seventh) of the NBA, providing that national banks may engage in the business of banking and "all such incidental powers as shall be necessary to carry on the business of banking."⁷² Furthermore, the Supreme Court in *Barnett Bank of Marion County v. Nelson*⁷³ held that state legislation could not restrict national banks from selling insurance.

Likewise, insurance companies started to sell securities—e.g., products such as variable annuities—and found ways to bypass restrictions of the BHCA, which prohibited mixing of banking and nonbanking activities.⁷⁴ Some strategies to achieve this consisted of owning a thrift subsidiary,⁷⁵ a "nonbank" bank,⁷⁶ and operating a limited purpose trust.⁷⁷

United States Senator Gramm of Texas, in a November 3, 1999 floor statement, summarized this evolution:

This bill we bring to the floor of the Senate basically knocks down the barriers in American law that separate banking from insurance and banking from securities. These walls, over time, because of innovative regulators and because of the pressure of the market system, have come

71. The National Bank Act of 1916, 39 Stat. 752, 753-54 (codified at 12 U.S.C. 92 (1994)), permits a national bank located in a place with a population of less than five thousand people to act as an insurance agent. In 1993, the United States Supreme Court held that this statute was still on the books. See *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Amer.*, 508 U.S. 439, 463 (1993).

72. 12 U.S.C. § 24 (1994). See also *NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (holding that the sale of annuities by national banks to their customers was "incidental" to "the business of banking" under the National Bank Act. Variable annuities were held to be financial products).

73. 517 U.S. 25 (1996).

74. The variable annuity was held to be a security by the Supreme Court. See *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 71-72 (1959). Annuity premiums were invested in securities, and therefore the performance of such investments determined the income of the variable annuity, a product sold to compete with mutual funds.

75. The Savings and Loan Holding Company Act (Codified as 12 U.S.C. § 1730A (1994)) provided that a company owning a single thrift institution, with sixty-five percent or more of its assets devoted to housing or consumer-related lending, was not restricted to any restrictions on other activities undertaken by the company. GLB closes this loophole.

76. A nonbank bank is an institution that failed to meet the BHCA's definition of a bank, which is an institution that both accepts demand deposits and makes commercial loans. The Competitive Equality Bank Act of 1987 closed this loophole, but grandfathered nonbank banks existing as of March 5, 1987. See 12 U.S.C. § 1841 (c)(A) (1994) (defining "bank" under the BHCA).

77. See 12 U.S.C. § 1841(c)(2)(D) (1994). A trust company is not considered a bank under the BHCA if functioning "solely in a trust or fiduciary capacity," accepting only trust funds deposits (as opposed to demand deposits) and does not offer FDIC insurance.

to look like very thin slices of Swiss cheese. As a result, we already have substantial competition occurring, but it is competition that is largely inefficient and costly, it is unstable, and it is not in the public interest for this situation to continue.⁷⁸

The convergence, which took place between banks, insurance companies, and securities firms, and the trend toward consolidation of these industries to create "one-stop-shop" financial centers, is best illustrated by the 1998 merger of two large United States banks, Citicorp and Travelers, into the conglomerate, Citigroup.⁷⁹ The Federal Reserve Board ("FRB") approval of the merger was subject to the divestiture of the Travelers' insurance underwriting business.⁸⁰ Under the BHCA, the divestiture period for non-conforming assets is two years by statute, with the FRB allowed to grant three additional one-year extensions.⁸¹ Obviously, Citigroup was counting on Congress to change the laws before the expiration of the divestiture deadline.⁸²

In passing GLB, Congress gave formal recognition of the many changes that had already occurred in the marketplace during the prior two decades.⁸³ Senator Rod Grams of Minnesota acknowledged that the world envisioned by GLB already existed at the time of enactment, stating that "many times Congress shows up at the dance after the music is over."⁸⁴

However, attempts to repeal the Glass-Steagall Act began almost as soon it was passed.⁸⁵ The most vocal proponent of its repeal was, ironically, one of the bill's authors, Senator Carter Glass. Only two years after the Glass-Steagall Act was adopted, Glass believed it was a "mistake and overreaction."⁸⁶ However, the more frequent and serious reform attempts were made in the 1980s and 1990s. The last unsuccessful attempt

78. Steve Cocheo, *The "Big One" Becomes Law; S.900: The Gramm-Leach-Bliley Act*, ABA BANKING J. (1999).

79. Cox, *supra* note 65, at 902.

80. *Id.*

81. 12 U.S.C. § 1843(a)(2) (1994).

82. See Cox, *supra* note 65.

83. Cocheo, *supra* note 78, at 6.

84. See Douglas P. Faucette, *The Impact of Converge and the Gramm-Leach-Bliley Act on the Insurance Industry*, 8 GEO. MASON. L. REV. 623, 629 (2000) (citing Dean Anason, *Senate Passes Reform Bill*, AM. BANKER, Nov. 5, 1999, at 1).

85. *Id.*

86. See Rep. James A. Leach, *Modernization of Financial Institutions*, 25 IOWA J. CORP. LAW 681, 683 (2000) (citing Robert Litan, *It's Alive, Why Glass-Steagall, Reviled for Decades, Just Won't Go Away*, THE WALL ST. J., Apr. 10, 1998, at A6).

was in 1998, with the proposed Financial Services Competitiveness Act of 1997. H.R. 10, introduced in the 105th Congress, would have repealed Sections 20 and 32 of the Glass-Steagall Act, thus allowing affiliations among banks, securities firms, and insurance firms through financial holding companies to be regulated by the FRB.⁸⁷ The proposed Act would also have created a new entity, the Wholesale Financial Institution, which would not accept deposits of less than \$100,000, and would not be federally insured.⁸⁸ The White House opposed elements of H.R. 10, because it would have shifted some regulatory duties from the Department of the Treasury to the FRB. The bill was approved by the full House of Representatives on May 13, 1998 by one vote, but failed to reach a Senate vote, due to Senator Gramm's opposition to the CRA provisions in the bill.⁸⁹

Building on the activity that took place during 1997 and 1998, early legislation action followed in the 106th Congress. In the House of Representatives, Representative James Leach, Chairman of the House Committee on Banking and Financial Services, introduced on January 6, 1999, H.R. 10, the "Financial Services Act of 1999."⁹⁰ On March 4, 1999, the Senate Banking Committee, under the Chairmanship of Senator Phil Gramm, revised a Committee Print that was then introduced as S.900, the "Financial Services Modernization Act of 1999."⁹¹

On March 23, the House Committee on Banking and Financial Services approved H.R. 10, which was then sequentially referred to the House Commerce Committee.⁹² In the meantime, on April 28, 1999, the Senate Banking Committee formally filed S.900, Financial Services Modernization Act of 1999, in the Senate.⁹³ On May 6, 1999, the Senate passed an amended version of S.900, by a vote of 54-44. The House Committee on Commerce, under Chairman Thomas Bliley, reported its own version of H.R. 10 on June 15, 1999.⁹⁴ Subsequently, the House Rules Committee resolved differences between the two versions of H.R. 10 and sent it to the House of Representatives, which passed the bill on

87. *Id.*

88. *Id.*

89. *Id.*

90. H.R. 10, 106th Cong. (1st Sess. 1999).

91. *Financial Service Modernization Act of 1999*, Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, to accompany S.900 together with Additional Views, S. Rep No. 106-44 (2000).

92. *Id.*

93. *Id.*

94. *Id.*

July 1, 1999 by a vote of 343-86.⁹⁵ H.R. 10 and S.900 then went to conference under bill number S.900.⁹⁶

On August 3, 1999, the Conference Committee held its first meeting, chaired by the Chairman of the House Banking Committee, Representative James Leach (Republican, Iowa).⁹⁷ On October 12, 1999, Chairman Gramm, Leach, and Bliley released a "Chairmen's Mark," which became the document from which the conference committee would work.⁹⁸ On October 14, 1999, the Department of Treasury and the FRB reached a compromise over their corresponding supervisory roles.⁹⁹ On October 22, 1999, the conference committee held a final meeting. A compromise was reached on CRA, and the bill was named the Gramm-Leach-Bliley Act. The Conference Report,¹⁰⁰ together with the Statement of Managers Summary of Major Provisions dated November 1, 1999, was approved and signed by majority of conferees on November 2, 1999.¹⁰¹ On November 4, 1999, the Senate approved the Conference Report on S.900, by a vote of 90-8.¹⁰² The House of Representatives followed within hours by a vote of 362-57.¹⁰³ On November 12, 1999, the President signed the bill into law.¹⁰⁴

GLB repeals Sections 20 and 32 of the Glass-Steagall Act.¹⁰⁵ Section 20 prohibited member banks from affiliating with a company "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities."¹⁰⁶ The Act also repealed Section 32 of Glass-Steagall which provided that "no officer, director or employee" of a firm principally engaged in underwriting securities may serve "as an officer, director, or employee" of a member bank of the

95. *Id.*

96. *Financial Service Modernization Act of 1999*, *supra* note 91.

97. *Id.*

98. *Id.*

99. *Id.*

100. H.R. CONF REP. No 106-434 (1999).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. GLB did not affect Sections 16 or 21 of Glass-Steagall.

106. 12 U.S.C. § 377 (1994).

Federal Reserve.¹⁰⁷ This provision allows for the interlocking of various boards of banks and securities firms.¹⁰⁸

The Bank Holding Company Act prohibited bank holding companies from “providing insurance as a principal, agent, or broker.”¹⁰⁹ GLB’s reversal of that restriction cleared the path for financial holding companies to own insurance companies.¹¹⁰ Under GLB, a company that wishes to participate in such industries must apply with the FRB to attain a financial holding company status.¹¹¹ This new type of bank holding company, known as a financial holding company, may engage in expanded financial activities, either directly or via subsidiaries.¹¹² A bank holding company that is not a financial holding company will be restricted in its activities to those that were previously determined to be closely related to banking.¹¹³ To that effect, Section 102 of GLB amends Section 4(c)(8) of the Bank Holding Company Act, allowing a bank holding company to control “shares of any company the activities of which had been determined by the Board by regulation or order under this paragraph . . . to be so closely related to banking as to be proper incident thereto”¹¹⁴ Only banks that are “well capitalized” and “well managed” may elect to become a financial holding company. GLB also establishes the FRB as the “umbrella regulator.”¹¹⁵

GLB modernizes the delivery of financial services to consumers, allowing the financial industry to cross-market services among affiliates and third parties.¹¹⁶ The elimination of legal barriers to affiliations among banks, securities firms, and insurance companies will facilitate “one-stop shopping” consumer offerings for banking, insurance, and securities

107. *Id.*

108. 12 U.S.C. § 78 (1994).

109. 12 U.S.C. § 1841 (1994).

110. Nguyen & Watkins, *supra* note 61.

111. *Id.*

112. *Id.*

113. *Id.*

114. 12 U.S.C. § 1843(c)(8) (1994).

115. *See generally* Nguyen & Watkins, *supra* note 61. Under the umbrella regulator structure, the Federal Reserve Board will regulate financial holding companies and their activities. Antitrust agencies such as the Department of Justice, Office of the Comptroller of Currency, Federal Trade Commission, the Fed, and the Federal Deposit Insurance Corporation retain the authority to review mergers and acquisitions. Other agencies—*i.e.*, the SEC and state insurance regulators—will continue to functionally regulate securities and insurance activities. *See generally id.*

116. *See id.*

transactions.¹¹⁷ Greater competition and a more efficient financial service system should result in substantial savings to the consumer.¹¹⁸ Also, GLB should increase the international competitiveness of American financial firms.¹¹⁹

GLB provides flexibility in structuring these affiliations and addresses how these structures will be regulated, including safeguards against adverse consequences from consolidation.¹²⁰ By allowing most activities "financial in nature"¹²¹ to be conducted by either a holding company or a bank's financial subsidiary, GLB provides financial organizations with flexibility in structuring these new activities. Although the FRB's role of umbrella supervisor is maintained, GLB provides for functional regulation, thus utilizing the strengths of the various federal and state regulators.¹²² How this will develop remains unclear: with banking, insurance, and securities products becoming increasingly similar, a rationalization of the regulatory structure may be revisited by Congress in the future.¹²³

GLB provides for safeguards designed to mitigate adverse consequences from consolidation within the financial industry, such as

117. Jonathan R. Macey, *The Business of Banking: Before and After Gramm-Leach-Bliley*, 25 J. CORP. L. 691 (2000).

118. *Id.*

119. *Id.*

120. *Id.*

121. Activities that are "financial in nature" include:

underwriting, dealing in, or making a market in securities; insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of such insurance, in any state; lending, exchanging, transferring, investing for others, or safeguarding money or securities; issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly; providing financial, investment, or economic advisory services, including advising an investment company; all activities the Board determined were closely related to banking or managing or controlling banks as to be a proper incident thereto as of November 12, 1999; engaging in all activities that traditional bank holding companies may engage in outside of the United States; engaging in all activities that the Board determined were "usual in connection with the transaction of banking or other financial operations abroad" as to November 11, 1999; engaging in merchant banking by directly or indirectly owning securities acquired and held by a securities affiliate, an investment adviser affiliate or an insurance underwriting affiliate as part of a bona fide underwriting or merchant or investment banking activity; and directly or indirectly owning securities as an investment made in the ordinary course of business as an insurance underwriter.

McCoy, *supra* note 8.

122. *Id.*

123. See Macey, *supra* note 59, at 692.

requiring a bank holding company seeking financial holding company status to be "well capitalized" and "well managed."¹²⁴ Another provision calls for a study to prevent the possible damage that would arise from the failure of a "too big to fail" institution.¹²⁵

GLB also provides for various consumer protection provisions, such as privacy of personal information and ATM fees disclosure.¹²⁶ A minimum federal standard of financial privacy has also been established.¹²⁷ However, as information sharing among affiliates is not subject to the new rules, the financial industry is not seriously affected in its ability to cross-market services among affiliates and third parties.¹²⁸ More legislation on privacy can be expected, such as on the sharing of medical information that financial conglomerates may possess through their insurance subsidiaries.¹²⁹ Major consumer protection provisions also include disclosure of surcharges on ATMs and consumer protection rules for insurance practices together with disclosure and advertisement requirements, including anti-tying provisions.¹³⁰

GLB maintains international supervisory standards established by the Basle Committee, which states that the holding company of a bank organization with multinational operations must be supervised by the home country of that bank.¹³¹ However, subsidiaries must register with the FRB as a "representative office."¹³² Foreign banks that do not maintain an American office may still be subject to United States banking supervision.¹³³ Foreign-owned United States broker-dealer and investment managers may be required to register with the FRB.¹³⁴ Also, a foreign banking organization that operates a branch or agency, or that owns or controls a bank or commercial lending company in the United States, is subject to the limits applicable to domestic bank holding companies and

124. *Id.*

125. Nguyen & Watkins, *supra* note 61.

126. Steve Bartlett, *Consumers Reap Benefits When Financial Firms Integrate Information*, 5 ELEC. BANKING L. & COM. REP. 8 (2001).

127. Nguyen & Watkins, *supra* note 61.

128. L. Richard Fischer, *The Gramm-Leach-Bliley Act and Its Implementation*, A.L.I.-A.B.A. 445 (2001).

129. Bartlett, *supra* note 126.

130. *Id.*

131. McCoy, *supra* note 8.

132. *Gramm-Leach-Bliley Act of 1999*, PLI Order B0-002A (2000).

133. *Id.*

134. *Id.*

financial holding companies.¹³⁵ Therefore, the FRB applies domestic requirements of capital management and activities to foreign banks that operate branches in the United States.¹³⁶

IV. NEW REGULATIONS

The regulations instituted since GLB significantly affect foreign banks that operate in the United States.¹³⁷ In January 2000, the FRB issued an interim rule that:

sets forth the procedures by which bank holding companies and foreign banks may submit to the Board an election to become a financial holding company and describes the period in which the Board will act on financial holding company elections. [The rule] also enumerates the criteria that bank holding companies and foreign banks must meet in order to qualify as a financial holding company. In addition, the newly added sections set forth the limitations that the Board will apply to financial holding companies that fail to maintain compliance with applicable capital, management, and CRA criteria.¹³⁸

In order to make the treatment of elections by foreign banks equal to those elections filed by domestic bank holding companies, the interim rule was amended to allow elections filed by foreign banks that meet the "well managed" and "well capitalized" provisions of the Act to become effective on the thirty-first day after filing, unless the Board finds the election unsatisfactory or the foreign bank agrees to extend the review period.¹³⁹ In addition, the Board amended the interim rule to require that all domestic depository institution subsidiaries (such as thrifts and nonbank trust companies) of electing foreign banks be "well capitalized" and "well managed" and have satisfactory or better composite and Community Reinvestment Act ratings.¹⁴⁰ This provision makes the requirements for foreign banks consistent with the requirements imposed on domestic bank holding companies.¹⁴¹ Finally, the Board amended the interim rule to deal

135. *Id.*

136. *Id.*

137. 65 Fed. Reg. 3785 (Jan. 25, 2000).

138. *Id.*

139. 65 Fed. Reg. 15053 (Mar. 21, 2000).

140. *Id.*

141. *Id.*

with banks that are chartered in countries where there is no comprehensive consolidated supervision determiner.¹⁴² Banks in such a situation should use the pre-clearance process provided by the interim rule if such a bank is considering making a financial holding company election.¹⁴³

The first amendment is intended to equalize the processing of elections filed by foreign banks and the processing of elections filed by domestic bank holding companies.¹⁴⁴ Under the provisions of the interim rule as issued on January 19, 2000, an application to attain financial holding company status by a foreign bank or company is not effective until the Board makes an affirmative finding that the foreign bank meets specific capital and management standards.¹⁴⁵

However, a domestic bank holding company's election for financial holding company status is effective within thirty-one days of its filing unless the Board determines otherwise.¹⁴⁶ Therefore, when a foreign bank applied to the FRB to obtain financial holding company status, the foreign bank was at the mercy of the FRB.¹⁴⁷ The FRB had no time limitations on its review of the foreign bank.¹⁴⁸ New regulations, however, impose a thirty-one-day time limit in which the FRB must determine whether the foreign bank is adequately capitalized and managed to be a financial holding company.¹⁴⁹

Under the amendment, the Board retains the authority to declare the election ineffective because of inadequate capital in comparison to the capital required for a domestic bank owned by a financial holding company.¹⁵⁰ The rule was also amended to allow the Board to find an election ineffective if the Board does not have sufficient information to assess whether the foreign bank meets the criteria of a financial holding company.¹⁵¹ These changes ensure that qualified foreign banks will receive equal treatment as similarly situated domestic bank holding companies. If a foreign bank does not meet the rule's specified requirements, it may file a pre-clearance request for a specific determination on the comparability of

142. *Id.*

143. *Id.*

144. 65 Fed. Reg. 15053 (Mar. 21, 2000).

145. 65 Fed. Reg. 3785 (Jan. 25, 2000).

146. *Id.*

147. *Id.*

148. *Id.*

149. 65 Fed. Reg. 15053 (Mar. 21, 2000).

150. *Id.*

151. *Id.*

its capital and management.¹⁵² This pre-clearance request means that the FRB will return an assessment of what areas of the company's capital and management do not meet the requirements needed to become a financial holding company.¹⁵³

The second amendment clarifies the interim rule with respect to foreign banks that do not have a United States subsidiary bank, but may have other United States depository institution subsidiaries, such as thrifts and nonbank trust companies.¹⁵⁴ The Gramm-Leach-Bliley Act requires that, in order for a bank holding company to be eligible to become a financial holding company, all depository institutions controlled by the bank holding company must be "well capitalized" and "well managed."¹⁵⁵ The interim rule required only that a foreign bank and each of its United States branches, agencies, and commercial lending subsidiaries be well capitalized and well managed in order for the foreign bank to be eligible as a financial holding company.¹⁵⁶ In order to make the requirements for foreign banks consistent with the requirements imposed on bank holding companies, the interim rule was amended to mandate that all domestic depository institution subsidiaries of the foreign bank must be "well capitalized" and "well managed" for the foreign bank to qualify as a financial holding company.¹⁵⁷ As a result, the rule was also amended to require that the foreign bank certify that its United States depository institution subsidiaries are "well capitalized" and "well managed."¹⁵⁸

A bank is deemed to be "well capitalized" if:

- (1)(i) its home country supervisor, as defined in §211.21 of the Board's Regulation K (12 CFR 211.21), has adopted risk-based capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision (Basel Accord);
- (ii) the foreign bank maintains a Tier 1 capital to total risk-based assets ratio of six percent and a total capital to total risk-based assets ratio of ten percent, as calculated under its home country standard;

152. 65 Fed. Reg. 15053 (Mar. 21, 2000).

153. *Id.*

154. *Id.*

155. *Id.*

156. 65 Fed. Reg. 3785 (Jan. 25, 2000).

157. 65 Fed. Reg. 15053 (Mar. 21, 2000).

158. *Id.*

(iii) the foreign bank maintains a Tier 1 capital to total assets leverage ratio of at least three percent; and

(iv) the foreign bank's capital is comparable to the capital required for a United States bank owned by a financial holding company; or

(2) the foreign bank has obtained a determination from the Board under § 225.91(c) that the foreign bank's capital is otherwise comparable to the capital that would be required of a United States bank owned by a financial holding company.

(c) standards for "well managed." A foreign bank will be considered "well managed" if: Each of the United States branches, agencies, and commercial lending subsidiaries of the foreign bank has received at least a satisfactory composite rating at its most recent assessment;

(2) the home country supervisor of the foreign bank considers the overall operations of the foreign bank to be satisfactory or better; and

(3) the management of the foreign bank meets standards comparable to those required of a United States bank owned by a financial holding company."¹⁵⁹

A bank is "well managed" if:

(i) at its most recent inspection or examination or subsequent review by the appropriate Federal banking agency for the depository institution, the institution received:

(A) at least a satisfactory composite rating; and

(B) at least a satisfactory rating for management; or

(ii) in the case of a depository institution that has not received an examination rating, the Board has determined, after a review of managerial and other resources of the

159. 65 Fed. Reg. 15053 (Mar. 25, 2000).

depository institution and after consulting the appropriate Federal banking agency for the institution, that the institution is well managed.¹⁶⁰

The third amendment to the interim rule relates to the review of comprehensive consolidated supervision ("CCS") in connection with elections by foreign banks to become a financial holding company.¹⁶¹ Home country supervision is an important factor in the determination of whether a bank is "well managed."¹⁶² Most foreign banks that elect to be treated as financial holding companies will be subject to comprehensive consolidated supervision.¹⁶³

The interim rule allows a foreign bank or company to request a review of its qualifications prior to formally filing its election to become a financial holding company.¹⁶⁴ In order to assist the Board's review of whether the management of a foreign bank meets the appropriate standards, the interim rule was amended. It encourages foreign banks that have not been reviewed by the Board with respect to home country supervision and that are chartered in countries where no other bank from that country has received a CCS determination from the Board (including a determination that the home country supervisor is actively working toward a system of CCS) to use the pre-clearance process if such bank is considering making an election to be treated as a financial holding company.¹⁶⁵

The amendment to the interim rule regarding bank holding companies is a revision of the definition of "well managed" applicable to a depository institution for purposes of determining qualification as a financial holding company under the Gramm-Leach-Bliley Act.¹⁶⁶ For this purpose, the Board initially adopted the existing Regulation Y definition of "well managed."¹⁶⁷ The Board's definition requires that a depository institution

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. 65 Fed. Reg. 3785 (Jan. 25, 2000).

165. 65 Fed. Reg. 15053 (Mar. 21, 2000).

166. *Id.*

167. (c) Well managed--(1) In general. For purposes of this subpart, a depository institution is well managed if:

(i) at its most recent inspection or examination or subsequent review by the appropriate Federal banking agency for the depository institution, the institution received:

(A) at least a satisfactory composite rating; and

(B) at least a satisfactory rating for management; or

have at least a satisfactory composite examination rating and at least a satisfactory rating for both management and compliance.¹⁶⁸ This three-part definition was initially adopted by the Board as part of its effort to determine whether a bank holding company qualifies for expedited treatment in applications processing.¹⁶⁹

Therefore, a bank holding company qualifies for expedited processing if eighty percent of the depository institution assets of the company were "well managed."¹⁷⁰ In order to become and remain a financial holding company under the Gramm- Leach-Bliley Act, all of the depository institution assets of a bank holding company must be "well managed."¹⁷¹

The Gramm-Leach-Bliley Act does not address compliance ratings in determining whether an institution is "well managed." Accordingly, the Board is amending its regulatory definition of "well managed" for purposes of determining qualification as a financial holding company to reflect the two-part test in the statute.¹⁷² Thus, a depository institution will be considered "well managed" for this purpose if it has a satisfactory composite rating and a satisfactory rating for management.¹⁷³

The Board continues to believe that compliance ratings are important and will address issues relating to compliance in other contexts. In particular, the Board and other federal banking agencies have supervisory authority to take full action against an institution if compliance issues are raised.¹⁷⁴ In addition, each agency may consider compliance ratings when determining whether to approve any merger or expansion proposal involving the depository institution or the parent bank holding company of the institution.¹⁷⁵

The Gramm-Leach-Bliley Act allows financial holding companies in the United States to conduct banking, investment and insurance business

(ii) in the case of a depository institution that has not received an examination rating, the Board has determined, after a review of managerial and other resources of the depository institution and after consulting the appropriate Federal banking agency for the institution, that the institution is well managed.

Id.

168. 65 Fed. Reg. 15053 (Mar. 21, 2000).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. 65 Fed. Reg. 15053 (Mar. 21, 2000).

174. *Id.*

175. *Id.*

through separate subsidiaries.¹⁷⁶ This is a step toward the universal banking system already in existence in Germany. However, these steps imposed more rigid capital and management standards for foreign banks with United States branches thus having a discriminatory effect on foreign banks. In the final implementing regulations, the FRB relaxed the requirements for foreign banks. As a result, it will be easier for German banks to obtain and preserve United States financial holding company status.

The new regulations will make it easier for foreign banks to enter the United States market. Not only do the regulations level the playing field between domestic and foreign banks, by applying the same standards and time limits, but they also clarify the process for becoming a financial holding company.

The first amendment to the interim ruling will eliminate the discriminatory effect that GLB had against the election of German financial service institutions to become financial holding company in the United States. By applying the same time period in which the Federal Reserve Board must decide whether or not an election for financial holding company status is effective, domestic financial service companies and foreign financial service companies have the same opportunity to gain the perks of being a financial holding company. Prior to the amendment, a German bank would have to wait until the FRB assessed its election, without any given time schedule. Now, German banks will be afforded the same thirty-one-day period as any domestic bank would receive.

The second and third amendments will continue to tear down barriers that GLB instituted by clarifying the election procedures for foreign companies. The original standards for becoming a financial holding company in GLB were vague and difficult for German banks to be in compliance. These new criteria apply the same tests to domestic applicants as well as foreign companies. As such, German banks will be on equal footing with United States banks.

V. CONCLUSION

The new regulations promulgated by the Federal Reserve Board will alleviate the discriminatory effect that Gramm-Leach-Bliley had on German banks operating in the United States. By equalizing the playing field, both domestic banks and foreign banks will have the same opportunities regarding the election of becoming a financial holding company.

176. McCoy, *supra* note 8.

U.S. DRUG COURT: A BUILDING BLOCK FOR CANADA

*Lisa Strauss**

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I. INTRODUCTION

Since the establishment of the first drug treatment court in Dade County, Florida, United States in 1989, these specialized courts have become a rapidly expanding alternative to traditional law enforcement.¹ Alternately called drug courts, drug treatment courts, or treatment courts,² these courts have spurred many debates as critics and proponents alike seek to conduct studies evaluating the drug courts' impact on recidivism rates as well as their effectiveness in rehabilitating drug addicts. While some studies point to the greatly reduced recidivism rates of drug court graduates and the economic advantages of this system, critics point to flaws in the studies.³ However, the rapid growth in the number of drug courts to almost 700 in operation in the United States today, combined with the federal government's fiscal support, leads to a conclusion that these specialized courts are here to stay.⁴ While drug courts in the United States have both proponents and critics, Canadian officials view the United States experiment with drug courts as a huge success.⁵ In 1998, the first Canadian drug court was set up in Toronto and based on the United States format. Further, Canada's Department of Justice Minister and Attorney General, Anne McLellan, recently announced that Canada's federal government plans to set up drug courts in all major Canadian cities by 2004.⁶

II. DRUG CONTROL IN THE UNITED STATES

A. *A Legislative Overview of United States Drug Control*

In the early 1900s, the United States federal government marked its entrance into the world of drug control first with the passage of the Federal Food and Drugs Act of 1906, which mandated truth in labeling, and then with the passage of the Harrison Narcotics Act of 1914.⁷ The Harrison

1. Mae C. Quinn, *Whose Team am I on Anyway? Musings of a Public Defender About Drug Treatment Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 48 (2000-2001).

2. Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, at 841 (2000).

3. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, at 1481 (2000).

4. John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 928 (2000).

5. Darlene James & Ed Sawka, Canadian Centre on Substance Abuse, *Drug Treatment Courts: Substance Abuse Intervention Within the Justice System* (2001), available at <http://www.ccsa.ca/DrugCourts.htm>.

6. Chad Skelton and Norm Ovenden, *B.C. Hails Ottawa's Plan for Drug Courts*, VANCOUVER SUN (Canada), Dec. 1, 2000, available at <http://www.cfdp.ca/index.htm>.

7. Hoffman, *supra* note 3, at 1454.

Narcotics Act of 1914 restricted distribution by requiring doctors to keep records of their disbursements of medication and imposing fines upon those who failed to comply.⁸ From this point forward, drug use was no longer solely a medical concern but was now part of a concerted effort by the federal government to control the use and abuse of narcotic substances through the imposition of control and punishment.⁹ Since then, varying tactics have been tried to curb the spread of drugs, including the use of harsher sentences for drug offenders. These laws, while having little impact on the supply and demand of drugs, have had an enormous impact on the criminal justice system and on the United States' Federal budget.¹⁰ When the 1960s brought widespread protest, rebellion and drug use, issues of drug sales, use and addiction began demanding heightened attention.¹¹ In response, President Nixon declared a "war on crime," promising to expand federal drug control laws.¹² By the 1980s, Presidents Reagan and Bush were spending billions of dollars on drug control efforts and narcotics enforcement within and outside United States borders.¹³ Rather than reducing the number of cases involving narcotics, these "war on drugs" tactics resulted in a larger-than-ever number of defendants passing through the criminal justice system, overloading an already overcrowded system.¹⁴

In 1970, Congress passed the Controlled Substances Act (CSA) which outlawed virtually all non-alcohol recreational drugs and required mandatory minimum sentencing for drug offenders.¹⁵ Between 1968 and 1988, drug prosecutions quadrupled, and by 1990 they accounted for one-third of all state felony prosecutions.¹⁶ This increase in prosecutions, coupled with the stiffer sentencing laws, resulted in an explosion of incarceration rates.¹⁷ As of November 1999, 60% of all federal prisoners were being incarcerated for drug offenses as compared to only 6.3% in 1970.¹⁸ Because of these drug laws, more people are incarcerated *per capita* in the United States than in any other industrialized country except

8. *Id.* at 1455.

9. Quinn, *supra* note 1, at 40.

10. Hoffman, *supra* note 3, at 1459.

11. Quinn, *supra* note 1, at 40.

12. *Id.* at 41.

13. *Id.* at 42.

14. *Id.*

15. Hoffman, *supra* note 3, at 1458.

16. *Id.* at 1459.

17. *Id.*

18. *Id.*

Russia.¹⁹ With the widespread use of crack cocaine in the 1980s, there was increased state and federal legislation mandating serious penalties for drug traffickers and users.²⁰ As the application of these laws threatened to overwhelm the criminal justice system, the courts by necessity sought effective alternatives to incarceration.²¹ This necessity, combined with the availability of credible research regarding the effectiveness of treatment in reducing both drug addiction and drug related crime, led many to believe that alternatives to incarceration could help the addict control addiction and therefore eradicate the crime committed by addicts in furtherance of their addiction.²²

Some supporters of the drug court programs believe the “war on drugs” should be viewed as a public health issue in addition to being a criminal justice issue.²³ The premise behind this belief is that drug addiction should be treated as a disease because it has been so classified by the American Medical Association.²⁴ The American Bar Association and the Centers for Disease Control have defined drug addiction as a disease as well, and supporters of this theory believe it is time to “medicalize” the war on drugs.²⁵ In light of this viewpoint, some United States supporters believe an addict should be considered a patient to be treated rather than a criminal to be incarcerated.²⁶

Some localities focused on the need to expedite the movement of narcotics matters through the court system while others focused on creating specialized courts to handle drug offenses only. However, neither case expedition nor specialized courts relieved the problem of overcrowding in prisons and jail.²⁷

B. The First United States Drug Courts

The movement toward a specialized drug court system began in the late 1980s in response to rising rates of drug-related court cases and the inability of traditional law enforcement and justice policies to reduce the

19. *Id.* at 458.

20. Dorf & Sabel, *supra* note 2, at 841.

21. *Id.*

22. *Id.*

23. *See, e.g.*, Jefferson M. Fish, *Rethinking our Drug Policy*, 28 FORDHAM URB. L.J. 9, at 48 (2000).

24. *Id.* at 49.

25. *Id.* at 52.

26. *Id.* at 65.

27. Quinn, *supra* note 1, at 42.

supply and demand for illegal drugs.²⁸ According to statistics from the United States Bureau of Justice, an increase in drug offenders accounted for nearly three-quarters of the growth in prison populations in the ten years between 1985 and 1995.²⁹ In 1997, 33% of state and 22% of federal inmates had committed their crimes while under the influence of drugs; approximately 60% were incarcerated for drug-related offenses; and more than 75% of the correctional population had substance abuse problems.³⁰

Traditionally, defendants convicted of drug offenses are either sentenced to a period of incarceration or referred for probation supervision.³¹ While some jurisdictions require drug testing to monitor use after conviction, they lack the capacity to respond quickly when a defendant has tested positive.³² Additionally, while a few jails and prisons provide comprehensive treatment services for inmates, they do not provide long-term rehabilitation support following a defendant's release.³³ Those jurisdictions that require drug treatment as a condition of probation usually do not monitor defendants after completion of the program to see if the drug treatment was successful.³⁴ This situation, combined with the fact that at least 45% of defendants will recidivate with a similar offense within two to three years, has led many justice system officials to conclude that the traditional case disposition process is not effective in reducing drug usage by persons convicted of drug offenses.³⁵

As participants in the criminal justice system began to abandon the view that punishment was the only effective treatment for addicts, treatment providers were softening their convictions that voluntary entry into a program was required for recovery.³⁶ Coerced treatment became a possible solution to breaking the chain of addiction.³⁷

Finally, a specialized drug treatment court in Miami, Florida was developed to integrate drug treatment with traditional case processing.³⁸

28. James & Sawka, *supra* note 5.

29. *Id.*

30. *Id.*

31. Drug Court Clearinghouse and Technical Assistance Project, U.S. Department of Justice, Looking at a Decade of Drug Courts (1998), available at <http://www.ojp.usdoj.gov/dcpo/decade98.htm>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Dorf & Sabel, *supra* note 2, at 842.

37. *Id.*

38. Goldkamp, *supra* note 4, at 943.

The innovators of this drug court were confronted with an overwhelmed criminal justice system because police arrests of drug offenders underwent a 93% increase in possession cases from 1985 to 1989.³⁹ Established in Dade County, Florida, in 1989 the court required defendants in the program to appear in court regularly, accompanied by a treatment provider's report on the client's performance in its program.⁴⁰ These reports were used to gauge the success or failure of the client as well as to monitor the effectiveness of the treatment provider.⁴¹ While the clients were rewarded for good behavior through encouragement, or penalized for infractions with sanctions such as short periods of incarceration for repeated violations, the treatment providers were evaluated for their programs.⁴²

The drug court strategy was an attempt to do something about the "root cause" of criminal activity associated with drug use by providing drug treatment with close judicial supervision in a drug court setting.⁴³ The drug treatment courts operated outside the conventional adversarial relationship usually seen in the courtroom and replaced it with a "team work" atmosphere in where all the players, including the judge, prosecutor, and defendant, worked together in the best interest of the defendant.⁴⁴ As this team-based approach took root, other localities began setting up similar systems. By 1994, forty-two drug courts had been set up in the United States.⁴⁵

C. Expansion of the United States Drug Court System

The first drug courts were developed and launched largely without aid from the federal government.⁴⁶ They were the result of the work of a small network of committed court officials and treatment providers searching for a solution for an overburdened criminal justice system.⁴⁷ In December 1993, the first national meeting of drug courts was convened in Miami, Florida and included representatives from over twenty drug courts already in operation.⁴⁸ The Honorable Janet Reno, the former Miami prosecutor

39. *Id.*

40. Quinn, *supra* note 1, at 44.

41. *Id.*

42. *Id.*

43. Goldkamp, *supra* note 4, at 943.

44. Dorf & Sabel, *supra* note 2, at 844.

45. *Id.* at 843.

46. Goldkamp, *supra* note 4, at 947.

47. *Id.* at 948.

48. *Id.*

instrumental in the development of the first drug court and later the Attorney General of the United States, addressed over 400 officials from across the United States, helping to garner support for a drug court approach.⁴⁹ Recommendations of this national meeting resulted in the creation of the National Association of Drug Court Professionals (NADCP) and spurred the Department of Justice to become involved in the development of drug courts.⁵⁰

As a result of the combined efforts of drug court supporters, interest in drug treatment courts grew throughout the nation.⁵¹ Interest in providing court-sponsored treatment to drug offenders, as opposed to imposing punitive alternatives, began to spread. The federal government began to play a large role in spreading the word about drug treatment courts.⁵² In 1995, the United States Department of Justice (DOJ) established a Drug Courts Program Office under the Violent Crime Control and Law Enforcement Act of 1994.⁵³ Simultaneously, personnel affiliated with the twelve drug courts then in operation formed the National Association of Drug Court Professionals.⁵⁴ The Office of Justice Program (OJP) established the Drug Court Clearinghouse and Technical Assistance Project (DCCTAP) to assist state and local justice system officials and treatment professionals in establishing drug court programs in their jurisdictions.⁵⁵ This office, in cooperation with the National Association of Drug Court Professionals, published a 1997 report entitled *Defining Drug Courts: The Key Components*.⁵⁶ Relying on the experiences of previous local drug court experiments, this report set forth guidelines outlining successful features of the drug courts to be utilized in setting up additional ones.⁵⁷ Some of the main requirements included the integration of drug treatment with case processing; prompt placement of eligible individuals into treatment; and close monitoring of defendants' drug use by the judge.⁵⁸ Thereafter, the DOJ conditioned the funding and grants for new drug courts on their establishment in accordance with the ten key components

49. *Id.*

50. *Id.* at 949.

51. Quinn, *supra* note 1, at 45.

52. *Id.*

53. Goldkamp, *supra* note 4, at 949.

54. Dorf & Sabel, *supra* note 2, at 844.

55. *Id.*

56. *Id.* at 845.

57. *Id.*

58. Goldkamp, *supra* note 4, at 936.

set forth.⁵⁹ At the national level, the federal government pooled information on the activities of the drug courts and extracted data to help create guidelines for successful treatment court structures.⁶⁰

Congress appropriated \$12 million in the OJP's first year to support the planning and implementation of drug courts in the United States.⁶¹ In fiscal year 1999, the OJP provided nearly \$20 million to approximately seventy jurisdictions that had applied for drug court grants in 1998.⁶² Since then, federal funding has grown each year, and on July 6, 2001, Attorney General John Ashcroft announced that \$30.9 million would be allocated to assist in the planning, establishment and improvement of drug courts.⁶³ Since 1995, the Justice Department's Drug Courts Program Office (DCPO) has made approximately 650 grants for a total of more than \$125 million.⁶⁴ There are currently 700 drug courts in operation in the United States with plans for the establishment of another 430.⁶⁵ Drug courts are currently in operation in all fifty states, and thirty-two states have already passed legislation supporting drug courts.⁶⁶

D. Focus and Operation of United States Drug Courts

Although drug treatment courts vary in operational detail throughout the nation, they share the same basic pattern.⁶⁷ People charged with low-level, non-violent criminal misconduct related to drug use may choose, with the consent of the prosecutor, to have the charges filed in the treatment court.⁶⁸ In this court, the defendant pleads guilty or accepts responsibility for a charged offense and accepts placement in a court-mandated treatment program.⁶⁹ The treatments offered these offenders vary, depending on the assessment of needs by the court personnel.⁷⁰ The

59. *Id.*

60. Dorf & Sabel, *supra* note 2, at 834.

61. Goldkamp, *supra* note 4, at 949.

62. United States Department of Justice, Office of Justice Program News, *available at* <http://www.ojp.usdoj.gov/dcpopr63.htm>.

63. Press Release, Attorney General Department of Justice, Communities Nationwide Receive Justice Department Funds for Drug Courts (July 6, 2001), *available at* <http://www.ojp.usdoj.gov/depo/070601.htm>.

64. *Id.*

65. *Id.*

66. *Id.*

67. Dorf & Sabel, *supra* note 2, at 831.

68. *Id.* at 832.

69. *Id.*

70. *Id.*

performance of the offender in the program is closely monitored by the judge and the court to determine if the treatment program is adequate or if a lesser or more intensive treatment plan is appropriate.⁷¹ Once the defendant successfully completes the program, the conviction is usually expunged.⁷²

Drug courts focus on facilitating treatment for non-violent drug offenders by offering them an opportunity to complete a drug treatment program in return for a dismissal of charges or a reduction in custody or probation time.⁷³ The goal of the court is abstinence and law-abiding behavior through intense judicial supervision, comprehensive substance abuse treatment, frequent drug testing, incentives and sanctions, and clinical case management.⁷⁴ For drug treatment courts to be successful, court personnel must work closely with the treatment service providers to ensure that a high quality of care is being provided.⁷⁵ Because frequent contact with the court is part of the drug court program, the courts are in a position to detect and correct problems and provide oversight for treatment providers.⁷⁶

Today, more than half of all prison inmates are illegal drug users, and as each year brings new legislation mandating longer minimum sentences for drug crimes and harsher punishments for those who violate drug laws, court dockets are further overburdened and prisons continue to be overcrowded.⁷⁷ Drug treatment courts offer a viable alternative. While treatment courts provide an alternative to incarceration, they do not decriminalize drug use.⁷⁸

Until the creation of drug courts, the likelihood of offenders identified as having a serious drug problem being placed in treatment was poor.⁷⁹ While those sentenced to probation might find themselves placed in some sort of treatment program, those sentenced to incarceration were not likely to receive comprehensive drug treatment.⁸⁰ Prior to the creation of the drug treatment courts, the court's involvement in treatment was to refer offenders to treatment programs upon the recommendation of the probation

71. *Id.*

72. Dorf & Sabel, *supra* note 2, at 832.

73. James & Sawka, *supra* note 5.

74. *Id.*

75. Dorf & Sabel, *supra* note 2, at 869.

76. *Id.*

77. *Id.* at 831.

78. *Id.*

79. Goldkamp, *supra* note 4, at 931.

80. *Id.*

staff.⁸¹ While this approach may have worked years ago, the huge volume of cases that overwhelmed the justice system in the 1980s and 1990s has made it almost impossible for probation officers to monitor offenders' compliance with treatment.⁸² Under traditional practices, there was little communication between the court system and the treatment providers.⁸³ Drug courts now play a role similar to that of the probation officers in the past but wield the power of the criminal court, enabling them to more effectively see a drug offender through a treatment program.⁸⁴

Drug treatment courts operate on the premise that because they address drug problems, recidivism to the criminal justice system will decline.⁸⁵ However, various studies of this issue, depending on the underlying goals of those conducting the studies, offer varying statistics as to the success of drug courts achieving this goal.⁸⁶

E. Effectiveness of United States Drug Courts

According to the National Association of Drug Court Professionals (NADCP), drug courts have shown promising results, particularly in terms of reduced recidivism.⁸⁷ According to the Drug Court Clearinghouse and Technical Assistance Project (DCCTAP), a program of the Drug Courts Program Office of the United States Department of Justice (DOJ), "reductions in recidivism and drug usage are being achieved, with recidivism rates substantially reduced for graduates, and to a lesser but significant degree, for participants who do not graduate as well."⁸⁸

Although no formal cost-effectiveness studies have been conducted, evidence suggests that drug treatment costs are a lower-cost alternative to incarceration.⁸⁹ By diverting low-level drug-related defendants to drug treatment courts rather than keeping them in the traditional court and corrections system, courts have significantly reduced jail and prosecution expenditures.⁹⁰ In 1998, the drug courts program cost the DOJ \$30 million and with additional funding for fiscal year 2000, it will cost the DOJ \$50

81. *Id.*

82. *Id.* at 933.

83. *Id.* at 934.

84. Goldkamp, *supra* note 4, at 934.

85. *Id.* at 937.

86. *See, e.g.,* Hoffman, *supra* note 3.

87. James & Sawka, *supra* note 5.

88. *Id.*

89. *Id.*

90. *Id.*

million.⁹¹ Per person, drug courts cost about \$2000 annually, while the cost of incarceration is somewhere between \$20,000 to \$50,000 per person.⁹²

According to critics, while current evaluations of drug courts appear positive, they must be viewed with caution because no clear scientific studies have been conducted.⁹³ Additionally, rates of recidivism are often misleading due to the different sentencing models and treatment regimes prescribed by the different drug courts.⁹⁴ Also, because the drug court strategy is relatively new (beginning in the late 1980s) its long-term effectiveness in treating addiction and furthering an individual's successful functioning in society cannot be adequately gauged.⁹⁵

The DCCTAP at American University is sponsored by the DCPO and OJP. DCCTAP is responsible for evaluative information on drug courts throughout the United States.⁹⁶ While the DCCTAP points to reduced rates of recidivism among drug court graduates, it acknowledges that a number of issues give rise to difficulties in compiling data: difficulty in obtaining relevant data on the behavior of comparison group members; the changing nature of drug courts; lack of experienced researchers; inadequate management information systems in various localities; and a lack of long-term impact.⁹⁷ However, DCCTAP has published reports stating that drug courts have been successful in achieving their goals of reduction in recidivism and drug usage in the United States, and Canada has chosen to implement such courts based on the United States experiment.⁹⁸

While drug courts receive criticism for their "problem-solving" approach from critics who view them as inappropriate, or from critics who view drug court studies as flawed, the rapidly growing volume of drug courts operating in the United States suggests that they are here to stay.⁹⁹ As a result, the question that receives most focus is not whether they should be established but rather how they can best be implemented.¹⁰⁰

91. *Id.*

92. James & Sawka, *supra* note 5.

93. *Id.*

94. *Id.*

95. *Id.*

96. Looking at a Decade of Drug Courts, *supra* note 31.

97. *Id.*

98. *Id.*

99. Goldkamp, *supra* note 4, at 928.

100. *Id.*

III. DRUG CONTROL IN CANADA

The legal framework for drug control in Canada began in 1908 with the passage of the Opium Act, which created the first drug prohibition.¹⁰¹ In 1911, the Act was expanded to include opiates and cocaine, and in 1923 cannabis was added to the list of prohibited substances.¹⁰² "The Opium and Narcotics Act of 1929 became Canada's main instrument of Drug Policy."¹⁰³

In 1969, the Canadian Government's LeDain Commission, conducting a four-year study of substance abuse policy in Canada,¹⁰⁴ revealed that hundreds of thousands of Canadians were being convicted for possession of illegal substances.¹⁰⁵ The Commission recommended that the Canadian Government begin to look for alternatives to criminal sanctions against these offenders.¹⁰⁶ In 1987, "Canada's Drug Strategy" was implemented, and the government committed funds to support both supply and demand reduction programs and programs in enforcement, treatment and prevention programs.¹⁰⁷

In 1997, Canada consolidated previous drug acts and modernized Canada's drug control policy with the passage of a new Controlled Drugs and Substances Act (CDSA).¹⁰⁸ Like previous Acts, this Act did not include alternatives to conviction or punishment for drug possession.¹⁰⁹

The Canadian Centre on Substance Abuse (CCSA) was created by an Act of Parliament in 1988 to provide a national focus for substance abuse issues.¹¹⁰ The CCSA, receiving support from the Canadian justice and law enforcement communities, serves as a bridge between the private and public sectors, programmers and policy-makers, theorists and practitioners, and prevention specialists and police.¹¹¹ The CCSA has gained importance in Canada since independent territorial drug and alcohol

101. Diane Riley, Canadian Foundation for Drug Policy, *Drugs and Drug Policy in Canada: A Brief Review & Commentary* (1998), available at <http://canada.justice.gc.ca/en/index.html>.

102. *Id.*

103. *Id.*

104. Substance Abuse Policy in Canada: A Presentation to the House Standing Committee on Health (1996), available at <http://www.ccsa.ca/polrev.htm>.

105. Riley, *supra* note 101.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Substance Abuse Policy in Canada, *supra* note 104.

111. *Id.*

agencies began dismantling years ago.¹¹² The CCSA promotes awareness among Canadians of issues related to drug and alcohol abuse, promotes participation by Canadians in efforts to reduce the harm associated with alcohol and drug abuse, and measures the effectiveness of programs designed to eradicate this abuse.¹¹³ The Centre operates the National Clearinghouse on Substance Abuse which collects and disseminates information via its maintenance of databases.¹¹⁴ It provides free access to substance abuse information, along with "hot links" to other information providers around the world, via its site on the World Wide Web.¹¹⁵ The Centre also publishes directories, statistical profiles, pamphlets, research and policy papers, and special reports.¹¹⁶ The CCSA initiates and coordinates joint projects with law enforcement and health enforcement officials to set up public education campaigns, gather information on drug use, and study alternative approaches to drug enforcement.¹¹⁷

In Canada, while health care, prevention services, and educational programs fall under provincial jurisdiction, activists in the substance abuse field have suggested an active role for the federal government to provide coordination and leadership.¹¹⁸ In 1987, the government of Canada announced a "National Drug Strategy," later to be known as "Canada's Drug Strategy," in which the government committed funds amounting to Canadian \$210 million to combat drug abuse.¹¹⁹ This was a new addition to the government's spending of approximately Canadian \$168 million a year on both supply and demand reduction programs.¹²⁰

Canada, like the United States, has found a link between crime and drug dependency.¹²¹ Since the early 1970s, drug offenses have accounted for more than a third of the prison population growth in Canada, and since 1980 the incarceration rate for drug-related arrests has increased 1000%.¹²² As part of its effort to find an effective solution to drug-related crime,

112. *Id.*

113. *Id.*

114. *Id.*

115. Substance Abuse Policy in Canada, *supra* note 104.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Substance Abuse Policy in Canada, *supra* note 104.

121. Press Release, Department of Justice, Canada, Innovative Drug Treatment Court in Toronto Celebrates Official Opening (Jan. 8, 1999), available at <http://canada.justice.gc.ca/en/index.html>.

122. Riley, *supra* note 101.

Canada began setting up its first drug treatment court in Toronto in December of 1998.¹²³

IV. ALTERNATIVE TREATMENT PROGRAMS IN THE CANADIAN COURT SYSTEM

In Canada, approximately 10% of the federal inmates are incarcerated for drug offenses while more than 50% of the inmates have a substance abuse problem.¹²⁴ However, there are few Canadian substance abuse treatment programs designed for inmates.¹²⁵ In the early 1990s, the Offender Substance Abuse Pre-release Program (OSAP) was implemented to bring treatment to inmates.¹²⁶ In an evaluation of this program, it was found that rates of readmission to custody of these inmates were much higher among drug offenders with severe substance abuse problems.¹²⁷

In 1996, the Solicitor General of Canada introduced alternative sanctions and conditional sentencing as part of a reform package.¹²⁸ Included in the reforms was Bill C-41, which provided a legal mechanism for diverting offenders away from the criminal justice system and toward substance abuse treatment.¹²⁹ Also, changes in federal sentencing enabled the provinces and territories in Canada to administer their own alternative programs for first-time, non-violent offenders.¹³⁰ These sentencing reforms to the Statutes of Canada became law in September 1996.¹³¹ The legislation gave the courts an option to distinguish between crimes that should carry a jail sentence and those that would be more effectively dealt with through alternative sentencing.¹³² The legislation included principles to guide judges in determining fair sentences.¹³³ Included in these principles are statements that "an offender should not be imprisoned if less restrictive

123. Innovative Drug Treatment Court in Toronto Celebrates Official Opening, *supra* note 121.

124. James & Sawka, *supra* note 5.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. James & Sawka, *supra* note 5.

130. *Id.*

131. Solicitor General of Canada, Module 3—Sentencing reforms, (1998), available at www.sgc.gc.ca.

132. *Id.*

133. *Id.*

punishment is appropriate, and that judges must take any mitigating or aggravating circumstances into consideration.”¹³⁴

Included in the major reforms to Canada’s criminal code was the addition of conditional sentences for those offenders guilty of less serious crimes.¹³⁵ Judges can impose conditional sentences on an offender that allow the offender to serve the sentence in the community rather than in jail.¹³⁶ As part of the conditional sentence, judges may require that the offender obtain treatment for a substance abuse problem or do community service.¹³⁷ If the offender fails to comply with the conditions of the sentence, he or she can be brought back to court to serve out a sentence, have new conditions imposed, or have the suspension reinstated after a specified amount of time spent in custody.¹³⁸

This legislation for alternative sanctions also enables the provinces and territories to set up and administer their own versions of alternative measures programs.¹³⁹ Through these types of programs, society can avoid expensive and unnecessary court proceedings while at the same time providing a forum in which these less serious crimes can be dealt with in the community.¹⁴⁰

A. *The First Canadian Drug Courts*

In December of 1998, in response to the growing drug court movement in the United States, as well as the United Kingdom and Australia, Canada opened its first drug treatment court in Toronto.¹⁴¹ With federal funding of more than Canadian \$1.6 million over four years, this program reflects a collaborative effort between the Centre for Addiction and Mental Health (CAMH), the criminal justice system, the Toronto Police Service, the City of Toronto Public Health Department, the Health City Office and various community-based agencies.¹⁴² The CAMH has established a drug court program, similar to drug court programs in the United States, in which court participants will undergo assessment, stabilization, treatment, maintenance and aftercare.¹⁴³

134. *Id.*

135. *Id.*

136. Module 3—Sentencing reforms, *supra* note 131.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. James & Sawka, *supra* note 5.

142. *Id.*

143. *Id.*

In efforts to evaluate the overall success of the program, the Toronto drug treatment court experiment includes a comprehensive evaluation plan to assess cost-benefit and cost-effectiveness.¹⁴⁴ While the estimated cost per year for incarceration of a drug offender is \$47,000, the estimated cost per offender in the Toronto drug court program is approximately \$4,500.¹⁴⁵

The Toronto drug court plan includes an experimental design that compares a treatment group of those offenders who opt to go through drug court to a comparison group comprised of offenders who undergo the initial screening and are deemed eligible for the program but do not participate beyond assessment.¹⁴⁶ The plan will include following up on 200 participants for 24 months.¹⁴⁷ As of December 31, 1999, interim results of the study show a 56% retention rate for the experimental group, a rate lower than those found in many jurisdictions.¹⁴⁸ This may be a reflection of different sentencing practices for drug users in the United States and Canada. In the United States system, sentencing may be more severe, thus providing incentive for program participants to remain in the program longer.¹⁴⁹

B. Expansion of the Canadian Drug Court System

Overall, the Toronto experiment has been viewed as a success, and Canada's Department of Justice Minister and Attorney General, Anne McLellan, has announced that the federal government plans to set up drug courts in all major Canadian cities by 2004.¹⁵⁰ While the Toronto drug court only handled offenders charged with federal drug offences, other provinces, including Vancouver, are considering including offenders charged with property crimes to pay for their drug habits as drug court candidates.¹⁵¹

A plan for the Vancouver drug treatment court has been proposed but funds have not yet been specifically allocated for the project.¹⁵² The Vancouver drug treatment court is to be developed in conjunction with the development of a comprehensive drug policy framework for the province

144. *Id.*

145. *Id.*

146. James & Sawka, *supra* note 5.

147. *Id.*

148. *Id.*

149. *Id.*

150. B.C. Hails Ottawa's Plan for Drug Courts, *supra* note 6.

151. *Id.*

152. *Id.*

of British Columbia.¹⁵³ It is currently expected that the substance abuse component of the Vancouver drug treatment program would last anywhere from twelve to eighteen months and would include assessment, treatment and aftercare.¹⁵⁴

IV. ANALYZING THE SUCCESS OF UNITED STATES AND CANADIAN DRUG COURTS

A. *The Influence of Sentencing Guidelines*

1. Sentencing Guidelines in the United States

One of the main criticisms of current drug courts in the United States is that because of sentencing guidelines and minimums, many offenders enroll in drug courts as a way to avoid harsher sentencing.¹⁵⁵ During the 1970s and 1980s, Congress and many state legislatures passed mandatory minimum sentences that resulted in mandatory prison sentences for drug offenders, including non-violent, low level offenders.¹⁵⁶

In 1984, after extensive studies of rehabilitation theories of punishment and indiscriminate sentencing, Congress passed the Sentencing Reform Act of 1984 and created the United States Sentencing Commission (Commission).¹⁵⁷ In rejecting the sentencing flexibility included in the rehabilitative theory of punishment, Congress focused on the goal of deterrence and incapacitation.¹⁵⁸ The Commission established compulsory sentencing guidelines ("Guidelines") which were intended to limit judicial discretion so that similar sentences would be prescribed for defendants convicted of similar crimes under similar circumstances.¹⁵⁹ While the actual sentence was left to the discretion of a judge, the Guidelines established an acceptable range of punishment for any given crime.¹⁶⁰ While proponents argue that the Guidelines have effectively resulted in uniformity and certainty in sentencing, critics argue that the Guidelines have created more problems than they have resolved.¹⁶¹

153 James & Sawka, *supra* note 5.

154. *Id.*

155. *See, e.g.,* Fish, *supra* note 23, at 65.

156. Religious Action Center of Reform Judaism, Issues in Focus: Substance Abuse (2001), available at http://www.pdxnorml.org/drug_law_101.html.

157. Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 347 (1995).

158. *Id.* at 348.

159. *Id.* at 349.

160. *Id.*

161. *Id.*

Critics of the Guidelines as they relate to drug offenses focus their criticism on the mandatory minimum sentences.¹⁶² Prior to the passage of the Anti-Drug Abuse Act of 1986, federal judges were able to tailor sentences of drug offenders based on the differing circumstances of each case.¹⁶³ However, with the passage of this the Anti-Drug Abuse Act of 1986, Congress imposed mandatory minimum sentencing provisions for drug offenders.¹⁶⁴ The 1986 Act mandated a five-to-forty year sentence for first-time offenders convicted with possession with intent to distribute small quantities of specified drugs.¹⁶⁵

The 1988 Amendments to the 1986 Act increased the mandatory minimums and imposed these minimums for simple possession of smaller quantities of drugs.¹⁶⁶ The Violent Crime Control and Law Enforcement Act of 1994 (1994 Crime Bill) increased the use of mandatory minimums for drug-related offenses while at the same time emphasizing alternative types of punishment.¹⁶⁷ The 1994 Crime Bill also included grants for drug court programs.¹⁶⁸

Because of the strict sentencing guidelines found throughout the United States, it appears that the difficulty in gathering reliable statistics from drug court programs shall continue. Today, the drug court programs include those drug offenders who may choose drug court not because of a desire to undergo treatment for substance abuse but rather as an alternative to a more punitive jail sentence for a different crime.¹⁶⁹ As long as these types of offenders are processed through the drug court system, the effectiveness of these courts in treating addiction will be difficult to determine. However, society should benefit as a whole from the rehabilitation, rather than the incarceration of addicts.¹⁷⁰

2. The Absence of Sentencing Guidelines in Canada

In Canada, because of the absence of sentencing guidelines for drug offenders, the effectiveness of drug courts may prove clearer to ascertain. By the time Canada's first drug treatment court was established in Toronto in 1998, Canada's laws already allowed for offenders found guilty of less

162. Spencer, *supra* note 157, at 350.

163. *Id.* at 343.

164. *Id.*

165. *Id.*

166. *Id.*

167. Spencer, *supra* note 157, at 351.

168. *Id.* at 355.

169. See, e.g., Fish, *supra* note 23, at 65.

170. Hoffman, *supra* note 3, at 1487.

serious crimes to serve their sentence in the community rather than in jail.¹⁷¹ Because the alternative to drug treatment court is likely to be a light sentence,¹⁷² first time, non-violent drug offenders who enter Toronto's drug treatment court program are likely to be those who genuinely desire to receive substance abuse treatment, as opposed to those who may be opting for it in order to evade a harsher sentence.

B. The Need for Ongoing Study in both the United States and Canada

Three different types of studies have been utilized in determining the effectiveness of drug treatment courts in the United States.¹⁷³ The first type evaluates operational processes and analyzes data such as filings and drop-out rates of offenders to get an overall view of the drug court process.¹⁷⁴ A second type of study uses a cost-savings analysis to compare the operational and sentencing costs of drug treatment courts to these costs in traditional courts.¹⁷⁵ The third type of study is the "impact evaluation" study which attempts to assess the impact of drug courts by comparing recidivism rates between offenders who are processed through the drug courts to offenders processed through the traditional courts.¹⁷⁶

The main purpose of the drug court strategy is to reduce criminal activity associated with drug use by providing offenders with drug treatment along with close judicial supervision in a drug court setting.¹⁷⁷ With reduced crime as a goal, it would appear that the best way to measure the effectiveness of drug courts is to compare recidivism rates of drug offenders processed through the drug courts to those of drug offenders processed through traditional courts.¹⁷⁸ However, the value of recidivism studies depends a great deal on the length of the follow-up of an offender, and because drug court programs are still relatively new, follow-up of drug court attendees has been short-term.¹⁷⁹ Because drug courts treat the drug addict's addiction as the "root cause" of drug related crime,¹⁸⁰ if the drug

171. See, e.g., Module 3—Sentencing reforms, *supra* note 131.

172. James & Sawka, *supra* note 5.

173. Hoffman, *supra* note 3, at 1480.

174. *Id.*

175. *Id.*

176. *Id.*

177. Goldkamp, *supra* note 4, at 943.

178. Hoffman, *supra* note 3, at 1480.

179. *Id.* at 1486.

180. Goldkamp, *supra* note 4, at 943.

offender's addiction is successfully treated, the offender should not recidivate. To successfully evaluate the impact of drug court programs on recidivism rates, future studies will have to focus on the long-term follow-up of all drug court defendants.¹⁸¹

V. CONCLUSION

The United States drug control efforts of the 1980s and 1990s resulted in a larger-than-ever number of defendants passing through the criminal justice system, resulting in overloaded criminal court dockets and overcrowded prisons.¹⁸² In response to these rising rates of drug-related court cases, and to the inability of traditional law enforcement and justice policies to reduce the supply and demand for illegal drugs, a movement towards a specialized drug treatment court began in the United States in the late 1980s.¹⁸³ Since the creation of the first drug court in Miami, Florida, the movement has spread throughout the nation and there are currently over 700 drug courts in operation in the United States.¹⁸⁴ The United States has made firm commitments to support the growth of drug courts through the issuing of federal grants to those jurisdictions seeking to set up drug courts.¹⁸⁵

Canada began its first drug court experiment in Toronto in 1998. While firm financial commitments have not yet been made regarding future expansion of drug courts in Canada, Canada's Justice Minister and Attorney General, Anne McLellan, has announced that the federal government plans to set up drug courts in all major Canadian cities by 2004.¹⁸⁶ These drug courts will be modeled on the Toronto experiment and United States drug courts.¹⁸⁷

Complicating the impact evaluation studies of drug courts in the United States are the strict mandatory minimum sentences imposed on low-level drug offenders. Drug offenders who have no desire to receive drug treatment may opt for drug court simply to evade a prison sentence. Some of these offenders may not suffer from a substance abuse problem. If a substance abuse problem is not the "root cause" for a drug offender's

181 See, e.g., Hoffman, *supra* note 3, at 1486.

182. Quinn, *supra* note 1, at 42.

183. James & Sawka, *supra* note 5.

184. Communities Nationwide Receive Justice Department Funds for Drug Courts, *supra* note 63.

185. *Id.*

186. B.C. Hails Ottawa's Plan for Drug Courts, *supra* note 6.

187. *Id.*

criminal behavior, the drug court experience may be ineffective in reducing this offender's likelihood to recidivate.

Impact evaluations of Canada's drug courts should prove to be more accurate evaluations of the effectiveness of drug courts because those drug offenders who opt for the drug court program are likely to only be those with substance abuse problems. By the time Canada's first drug treatment court was established in Toronto in 1998, Canada's laws already allowed for offenders found guilty of less serious crimes to serve their sentence in the community.¹⁸⁸ Because first time, non-violent drug offenders have the option of lighter sentencing as opposed to mandatory prison time, they are less likely to opt for the drug court program unless they really desire treatment.

The rapid expansion of drug courts throughout the United States, and the recent establishment and proposed expansion of Canadian drug courts leads to the conclusion that drug courts are here to stay.¹⁸⁹ Because of the short history of drug courts in the United States and Canada, impact studies that evaluate the effect of drug courts on the recidivism rates of drug offenders have all been short-term.¹⁹⁰ Long-term impact studies over time will be the truest indicator of the drug court movement's success.¹⁹¹ However, given their short history, and the significant impact they have had in reducing the recidivism rates of drug offenders in the United States, the future looks bright for the drug court movement.

188. See, e.g., Module 3—Sentencing reforms, *supra* note 131.

189. See, e.g., Goldkamp, *supra* note 4, at 928; B.C. Hails Ottawa's Plan for Drug Courts, *supra* note 6.

190. Hoffman, *supra* note 3, at 1486.

191. See, e.g., Goldkamp, *supra* note 4, at 943.

THE CUBAN ADJUSTMENT ACT: A LAW UNDER SIEGE?

*Javier Talamo**

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I. INTRODUCTION

United States foreign policy toward Cuba has to a great degree been based on the containment and management of Cuban nationals seeking to migrate to the United States. On both sides of the Florida Straits, policy makers balance domestic political interests with foreign policy objectives, while seeking to manage the ever-present threat of a massive migration crisis.

From the early days of the "freedom flights,"¹ the Mariel boatlift,² the Guantanamo Refugee³ crisis, The Cuban Refugee Adjustment Refugee Act

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1. In November of 1966, following a massive sea exodus from the port of Camarioca in Cuba, the Johnson administration set up formal flights to bring Cubans seeking refuge to the United States. Those flights became informally known as the freedom flights.

2. In 1980, Cuban president Fidel Castro allowed Cubans, who wanted to leave to the United States to be picked by their relatives through the port of Mariel. It became known as the Mariel Boat Lift.

of 1966⁴ (CAA) has been at the center of the vortex. This United States law has been lauded as the proper vehicle to illustrate our "very strong desire that Cuba shall be freed from Communist domination and that the Cuban people will again, be able to enjoy the benefits of freedom"⁵ and it has been labeled as a "diabolical killing machine that claims lives and provokes tragedy."⁶

During last few years efforts to repeal the CAA have intensified both in Cuba and in the United States. Several legislative efforts have been made to repeal it and immigration reform groups have joined the fight to have the CAA overturned. Refugee advocates have complained that the Immigration and Naturalization Service (INS) interpretation of new statutes affecting the CAA has caused a "de facto repeal of the Cuban Adjustment and circumvented congressional intent"⁷ and litigation over the application of the CAA has ensued.

This comment seeks to analyze the congressional intent for passing the CAA, the early application of the statute, its application in subsequent migratory crisis, INS interpretation of its application and validity, and the political battles that have ensued in an effort to repeal it.

II. CUBAN ADJUSTMENT ACT OF 1966: CONGRESSIONAL INTENT

During the period of 1902-1959 the United States did not have a separate policy to deal with Cuban migration.⁸ The migration of Cubans to the United States followed an orderly process and Cuba was not seen as migratory threat⁹. On January 1, 1959, Fidel Castro seized control of the Cuban government and shortly thereafter installed a communist dictatorship on the island. Cuban migration exploded following the Cuban revolution, and the number of Cubans entering the United States grew from 70,000¹⁰ prior to 1959 to over 1,053,000 in 1990.¹¹

3. In 1994 Fidel Castro allowed Cubans who wanted to leave the island to do by sea. That resulted in a large refugee exodus by Cubans using boats and rafts. The United States Coast intercepted the refugees and detained them at the US naval base in Guantanamo Bay, Cuba.

4. Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966); 8 U.S.C. § 1255 (1994 & Supp. II 1966) [hereinafter Cuban Refugee Adjustment Act of 1966].

5. H.R. REP. NO. 89-1978, at 4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3792, 3794.

6. President Fidel Castro Ruz, Address at the 7th Congress of Federation of Cuban Women (Mar. 8, 2000).

7. Maria Dominguez, *Cuban Adjustment Act Survives*, C.A.B.A Briefs at 12 (1999).

8. Matias F. Travieso-Diaz, *Cuban Immigration: Challenges and Opportunities*, in CUBA IN TRANSITION-ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 65,66 (1998).

9. *Id.*

10. *Id.* at 66.

In January of 1961, the United States severed diplomatic relations with Cuba and launched an exile led invasion known as the “the bay of Pigs”¹² in an effort to overthrow the Cuban government¹³. In 1962, the United States banned commercial transportation to and from Cuba. Following the Castro revolution, political and economic conditions in Cuba deteriorated and the numbers of Cubans seeking to migrate to the United States increased dramatically.¹⁴ These early refugees were paroled into the United States and no interdiction and deportation efforts were made. These early refugees received public assistance by programs set up by the United States government for their benefit.¹⁵

In 1965, the Cuban government allowed all those who opposed the communist government to leave the island by sea through the port of Camarioca and thousands fled to United States by boat, many with the aid of the exile community in the United States.¹⁶ President Lyndon B. Johnson was faced with the first mass exodus of Cubans to the United States. On October 3, 1965, the President welcomed the Cubans fleeing the island, declaring in a speech “that those seeking refuge here in America will find it. We Americans will welcome these Cuban people.”¹⁷ The United States formalized the orderly departure of Cubans from the island by instituting the “freedom flights” on December 1, 1965.¹⁸

This migration crisis resulted in thousands of Cuban nationals being paroled into the United States for an indefinite period of time without the possibility of returning to their country of origin.¹⁹ Cuban refugees could only adjust their status to permanent resident by leaving the United States and seeking an immigrant visa at a United States consulate and returning to the United States as permanent residents.²⁰ This process proved difficult if not impossible for most refugees and the number of migrants paroled into

11. United States Census Bureau 1990, at <http://factfinder.census.gov/servlet/BasicFactsServlet> (last visited Feb. 20, 2002).

12. A group of Cuban American soldiers trained by the CIA invaded Cuba on April 17, 1961. The invasion took place on Bahia de Cochinos on the southern coast of Cuba. Bay of Pigs is the English translation of Bahia de Cochinos.

13. *Id.*

14. Travieso-Diaz, *supra* note 8, at 66.

15. Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121.

16. *The Cuban Adjustment Act of 1966: ?Mirando Por los Ojos de Don Quijote O Sancho Panza?*, 114 HARV. L. REV. 902, 904 (2001).

17. President Lyndon Johnson, Address to the People of Cuba (Oct. 3, 1965).

18. *The Cuban Adjustment Act of 1966: ?Mirando Por los Ojos de Don Quijote O Sancho Panza?*, *supra* note 16, at 904.

19. Dominguez, *supra* note 7.

20. H.R. REP. NO. 89-1978.

the United States far outnumbered those able to obtain an immigrant visa. Congress reasoned that the process in place would create "great personal hardship to those already impoverished by force or circumstance."²¹ Congress intended to create legislation which would enhance the resettlement of Cuban refugees and to improve their opportunity to be gainfully employed and educated in the United States.²² It is against this backdrop that congress decided to expedite the adjustment of status for Cuban refugees by implementing the Cuban Refugee Adjustment Act of 1966.

On November 2, 1966, Congress passed the Cuban Adjustment Act. The act states:

That notwithstanding the provisions of section 245(c) of the Immigration and Naturalization Act the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present for at least one year, may be adjusted by the Attorney General in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence, if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.²³

From the unambiguous language of the statute it would appear that the law could be easily applied to Cuban migrants as they entered the United States in succeeding years. However, the CAA has been a source of controversy and many attempts have been made to repeal it, restrict it or modify it. The maxim that "the function of a court in interpreting a statute is to determine the intent of Congress in enacting the statute and to give effect to that intent"²⁴ does not seem to apply to the various applications given to the Cuban Adjustment Act.

The Cuban adjustment act was the byproduct of an era when the United States had a "willingness to approve legislation to aid the persecuted peoples of the world."²⁵ Other legislation passed during that era suggests that protective immigration laws were used as a United States

21. *Id.* at 3794.

22. *Id.* at 3793.

23. Cuban Refugee Adjustment Act, *supra* note 4.

24. *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534 (1940).

25. H.R. REP. NO 89-1978.

policy statement against Communism.²⁶ The debate over the usefulness of the CAA took center stage after the end of the Cold War and it has now become the pivotal issue in United States-Cuba relations.

III. APPLICATION AND USE IN SUBSEQUENT MIGRATION CRISIS: MARIEL-GUANTANAMO

United States-Cuba migration policy was severely tested in the spring of 1980, when on April 19, Fidel Castro opened the port of Mariel and allowed Cubans to migrate. Within days, relatives from the United States flooded the Straits of Florida with vessels seeking to bring their relatives to the United States. Between April 1 and September 25, 1980, 124,776 Cuban nationals entered the United States by sea.²⁷

The United States government welcomed these refugees. Congress declared, "It is the historic policy of the United States to the respond to the urgent needs of person subject to persecution in their homeland."²⁸ The act defined a refugee as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or well-founded fear of persecution."²⁹

Analysis of the Acts' legislative history indicates that the statutory language indicating the United States "would provide aid for necessary transportation, to this country of refugees of special humanitarian concern to the United States" applies to Cubans.³⁰ The Refugee Act of 1980 reduced the physical presence requirement for Cubans seeking adjustment from two years to one.³¹ This reduction led some refugee advocates to infer that since the same period of adjustment applies to refugees as it does for Cubans seeking adjustment under the CAA, this signaled legislative intent to consider Cubans *de facto* refugees.³²

26. See Dominguez, *supra* note 7, (discussing Pub. L. No. 85-559 on behalf of Hungarian Refugees; Pub. L. No. 86-648 (on behalf of refugees within the mandate of the U.N. High Commissioner for Refugees) and Pub. L. No. 89-236 (on behalf of refugees from communist countries outside the Western Hemisphere)).

27. United States Coast Guard, *Mariel Boat Lift*, U.S. COAST GUARD ALIEN MIGRANT INTERDICTION, at <http://www.uscg.mil/hq/g-o/g-opl/mle/mariel.htm> (last visited Jan. 15, 2002).

28. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. § 1521 (1980) [hereinafter Refugee Act of 1980].

29. *Id.*

30. *Id.* See also Michael W. Lind, *Cuban Refugees at Sea: A Legal Twilight Zone*, 24 CAP. U. L. REV. 789, 793 (1995) (discussing S. Rep. No. 256, 96th Cong., 1st Sess. (1979)).

31. Refugee Act of 1980, *supra* note 28. 94 Stat. 108 (B)(i) amended the first section of the Cuban Adjustment Act by striking out two years and inserting in lieu one year.

32. Dominguez, *supra* note 7.

In 1984, the office of special council instructed INS that the Cubans seeking adjustment under the CAA would not be dependent on the availability of an immigrant visa and therefore the numbers of those receiving permanent residence would not be limited by the number of visas available. The court in *Fair v. Meese*³³ held that nothing in the 1976 amendment to the CAA required that any applicants be charged against the collateral quotas, regardless of the entry dates.³⁴

In 1984, the United States and Cuba negotiated the return to Cuba of those persons who had arrived during Mariel and were ineligible to remain in the United States.³⁵ This agreement affected approximately 2700 Cubans who had committed serious crimes in Cuba or the United States or those psychiatric patients that Castro had forced to travel to the United States.³⁶

The combination of Castro's political oppression, Cuba's failed economic policies, and the beneficial treatment of the Cuban adjustment act resulted in the settlement of over 750,000 Cubans into the United States between 1959-1990.³⁷

Since 1960 Cuba's economy has been heavily dependent on Soviet aid.³⁸ When the Eastern communist block collapsed in the early 1990s, Cuba's primary source of income declined dramatically and this resulted in scarcity of consumer goods and additional burdens on the Cuban people.³⁹ As internal discontent grew, the number of people risking their life in the Florida Straits increased proportionally.⁴⁰ On July 13, 1994, a group of people seeking to leave the island hijacked a ferryboat in Havana Harbor.⁴¹ The boat was sunk by the Cuban border patrol resulting in the death of thirty-seven people.⁴² In the subsequent weeks three other passenger

33. *Fair v. Meese*, 643 F. Supp. 983 (S.D. Fla. 1986).

34. *Id.* at 988.

35. Matthew A. Pingeton, *United States Immigration Policy: Detaining Cuban Refugees Taken From the Sea*, 8 J. TRANSNAT'L L. POL'Y 329, 330 (1999).

36. *Id.*

37. 1990 U.S. Census Bureau, reprinted in Silvia Pedraza, *Cuba's Refugees: Manifest Migrations*, in 5 CUBA IN TRANSITION: ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 311, 315 (1995).

38. Travieso-Diaz, *supra* note 8, at 67.

39. *Id.*

40. *Id.*

41. *Id.*

42. See generally Geoffrey W. Hymans, *Outlawing the Use of Refugees as Tools in Foreign Policy*, 3 I.L.S.A. J. INT'L & COMP. L. 149, 152 (1996). The Cuban government claimed that the sinking was an accident. However, survivors claimed that the boat was rammed by water cannons from three government tugs and then rammed by one of the vessels.

ferries were hijacked, as well as a plane and a military vessel.⁴³ On August 5, 1994, rumors circulated in Havana that another ferry boat was going to be hijacked to the United States. More than 500 people gathered on the docks and the most serious anti-government riots occurred since Castro took power.⁴⁴

Castro responded to the crisis by removing exit restrictions for those seeking to flee to the United States by sea. In an article in *Prensa Latina*,⁴⁵ Castro stated that “we will stop blocking the departure of those who want to leave the country” and “we cannot continue to guard the coasts of the United States.”⁴⁶

Cubans were now free to flee the country without the threat of interdiction by Cuban patrol boats and without being subjected to the “illegal exit” penalties of Cuban law.⁴⁷ This resulted in the immediate departure of large numbers of migrants using home made rafts and taking the perilous journey to the United States.

The Clinton administration responded to the crisis by reversing the traditional policy of welcoming Cuban refugees to the United States. On August 19, 1994, President William Clinton announced that the United States would bar the “rafters” from entering the country. The United States Coast Guard was instructed to detain the migrants at sea at transport them to the Guantanamo Bay Naval Base as a precursor to repatriation.⁴⁸

The interdiction at sea of Cuban nationals in the high seas and the sudden reversal of the long held policy of protecting political refugees created a politically volatile situation for the Clinton administration and threatened to produce a *de facto* repeal of the Cuban Adjustment Act.

By preventing Cubans from reaching United States territory, the Clinton Administration prevented the first legal requirement of the CAA from being met. The first requirement is that the applicant be “inspected and admitted or paroled into the United States.”⁴⁹ Although the decision to

43. *Id.*

44. *Id.* at 153.

45. *Prensa Latina* is Cuba’s official news agency.

46. Hymans, *supra* note 42, at 153.

47. Cuba’s penal code provides for a penalty for illegal departure. See U.S. Dept. of State, Country Reports on Human Rights Practice (Feb. 23, 2001) available at <http://www.state.gov/g/drl/rls/hrrpt/2000/wha/751.htm>.

48. Travieso-Diaz, *supra* note 8, at 67 (citing GAO, Cuba-U.S. Response to 1994 Cuban Migration Crisis, GAO/NSIAD 95-211(Sept. 1995)).

49. Cuban Refugee Adjustment Act of 1966, *supra* note 4.

prevent Cubans from entering the United States⁵⁰ while fleeing Communism was a new policy for the United States, detention of migrants seeking to reach United States territory was not.

Executive Order 12,807, issued by President Bush in 1992 as a response to the mass Haitian exodus of 1991,⁵¹ provided for the repatriation of undocumented aliens without the benefit of immigration proceedings. The order reads in part:

The president has the authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial seas of the United States.⁵²

Executive Order 12,807 prompted legal challenges that were resolved by the Supreme Court when it held that the repatriations of Haitians, without first determining whether they qualified as refugees⁵³, was not prohibited by section 243 of the INA or article 33 of the United Nations Convention Relating to the Status of Refugees.⁵⁴

Although Executive Order 12,807 was not directed at Cubans fleeing Communism, the order is not limited to specific nationality of aliens⁵⁵ and therefore Cubans can be repatriated under its authority.

President's Clinton's decision to prevent Cubans fleeing Communism from reaching the United States, and his reliance on President Bush's Executive Order 12,807 were in contraposition to his own Executive Order 12,854,⁵⁶ which implemented the Cuban Democracy Act (CDA).⁵⁷ His

50. The United States does not include waters or airspace subject to the jurisdiction of the United States. 8 U.S.C. § 1101(a)(38).

51. For a helpful analysis of Exec. Order No. 12,807, see Summer L. Hackley, *Sea Interdictions: Are Aliens Apprehended on the High Seas Entitled to Protections Afforded by the Immigration and Nationality Act*, 6 *ILSA J. INTL. & COMP. L.* 143 (1999).

52. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992).

53. Refugee is "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person has habitually resided, and who is unable or unwilling to return to, and is unable to avail himself or herself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C.A. § 1101(a)(42)(A) (West 2001).

54. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, (1993).

55. Hackley, *supra* note 51, at 149.

56. Exec. Order No. 12,854, 58 Fed. Reg. 36,587 (July 4, 1993).

57. 22 U.S.C.A. § 6001 (West 2001).

order ratified, approved and affirmed the Congressional findings and its intent in passing the CDA. As it relates to the CDA Congress found that

[t]he government of Fidel Castro has demonstrated consistent disregard for internationally accepted standards of human rights and for democratic value. It restricts the Cuban people's exercise of freedom of speech, press assembly, and other rights recognized by the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948.⁵⁸

The adoption of the CDA into United States law also codified the Congressional belief that fleeing persecution is legitimate methods of opposing a dictatorship. In its relevant part the CDA states: "The Cuban people have demonstrated their yearning for freedom and their increasing opposition to the Castro government by risking their lives in organizing independent democratic activities on the island and by undertaking hazardous flights for freedom to the United States and other Countries."⁵⁹

During the rafter crisis of 1994, the United States government appeared to have veered away for a policy of welcoming Cuban refugees to one of preventing their entrance into United States jurisdiction therefore preventing from becoming an "applicant for admission." The statutory definition of an applicant for admission is "an alien present in the United States or who has arrived in the United States."⁶⁰ Cubans housed at Guantanamo Naval base in Cuba were not given the benefit of the CAA when the courts ruled that the naval base was not "United States territory."⁶¹

The rafter crisis ended when the United States and Cuba began negotiations which would lead to an agreement on September 9, 1994 wherein the United States would Parole the Cubans detained in Guantanamo and Cuba would accept the repatriation of Cubans picked up at sea.⁶² The United States agreed to allow a minimum of 20,000 of Cubans to migrate legally to United States each year but only if they applied for immigrant or refugee visas at the United States Interest Section in Havana.⁶³ The refugees in Guantanamo were paroled⁶⁴ and the United States policy of welcoming Cubans fleeing from the island ended.

58. *Id.*

59. *Id.*

60. 8 U.S.C.A. § 1225(a)(1) (West 2001).

61. *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1424 (11th Cir. 1995).

62. *Id.* at 1418.

63. *Id.*

President Bill Clinton ignored congressional intent and his ratification of the Cuban Democracy Act⁶⁵ when he defended his policies in a speech on June 9, 1995 and declared:

We simply cannot admit all Cubans who seek to come here. We cannot let people risk their lives on open seas in unseaworthy rafts. . . . Regularizing Cuba migration also helps our efforts to promote a peaceful transition to democracy on the island For too long, Castro has used the threats of uncontrolled migration to distract us from this fundamental objective. With the steps we've taken, we will be able to devote ourselves fully to our real long term goals.⁶⁶

IV. ENFORCEMENT OR CIRCUMVENTION OF THE CUBAN ADJUSTMENT ACT?

The U.S.-Cuba migration accords created an apparent disparity between those who are interdicted at sea and almost certainly returned to Cuba, and those who manage to reach dry land. The race for the shore has become the prerequisite to receiving the benefits of the Cuban Adjustment Act. For Cubans, a United States vessel in international waters is not jurisdictionally sufficient, and a safe refuge under United States control does not suffice to trigger the "arrived in" the United States requirement of section 235 of the INA.⁶⁷

Cuban refugees are therefore required to avoid detection and to the head for United States shores. Even those who are apprehended in United States territorial waters still face deportation to Cuba. Courts have held that under the Immigration and Nationality Act of 1952, merely crossing into the territorial waters of the United States is insufficient to constitute physical presence for the purpose of determining whether an alien has entered the United States. The "physical presence" requirement of the entry test can be satisfied only when an alien reaches dry land.⁶⁸ Even

64. "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe . . . for urgent humanitarian reasons or significant public benefit any alien applying for admission into the United States" 8 U.S.C.A. § 1182(d)(5)(A) (West 2001).

65. 22 U.S.C.A. § 6001 (West 2001).

66. Travieso-Diaz, *supra* note 8, at 69, citing President William Clinton, Speech directed to Cuban-Americans, in ASSOCIATED PRESS June 27, 1995.

67. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

68. *Yang v. Maugans* 68 F.3d 1540, 1549 (3d Cir. 1995).

when the alien has disembarked and is heading to shore, the courts have held that a person is not "physically present" in the United States. This position was upheld when Chinese migrants aboard the vessel *Golden Venture* jumped into the water and waded through the surf before being detained.⁶⁹ The court held that

United States immigration law is designed to regulate the travel of human beings, whose habitat is land, not the comings and goings of fish or birds. We hold that an alien attempting to enter the United States by sea has not satisfied the physical presence element of Pierre at least until he has landed.⁷⁰

In 1999 a group of Cubans migrants tested the policy when they landed in Key Largo, Florida, and stood in water three feet deep: two were apprehended one hundred yards from shore and one made it ashore.⁷¹ Although their feet were on the same ground, only the one who came ashore was allowed to stay.⁷² An INS spokesman defended the policy stating "There are unique circumstances around every landing. The strict interpretation of the wet-foot policy is that the other alien was still in the water. The interpretation found that one had made landfall. Everybody knows you have to make landfall."⁷³

Has the wet-foot dry-foot policy deterred Cubans from leaving the island? The answer appears to be no. Just 1,400 Cuban migrants were intercepted at sea from 1995 to 1997.⁷⁴

The number of Cubans who reached United States shore totaled 2,048 in 1999—more than double 1998 total of 916.⁷⁵ An estimated eighty percent were believed to have been smuggled by professional smugglers who charge between \$1000 and \$5000 a head for the trip.⁷⁶

69. The *Golden Venture* was a merchant ship which left China on February 13, 1993 and transported Chinese migrants to the United States. The vessel ran aground on the morning of June 6, 1993, in New York.

70. *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995).

71. Yves Colon, *Touching Land Defines Who Stays, Goes*, MIA. HERALD, Jun. 30, 1999.

72. *Id.*

73. *Id.*

74. Jay Weaver, *U.S. Migration Policy Doesn't Deter Treacher Journeys, Cuban Smuggling on Rise*, MIA. HERALD, Dec. 12, 1999.

75. *Id.*

76. *Id.*

V. INS INTERPRETATION OF THE ILLEGAL IMMIGRATION AND IMMIGRANT RESPONSIBILITY OF 1996 (IIRIRA).

In effort to control illegal immigration Congress passed the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA).⁷⁷ The Act created confusion among the various districts as to what constitutes "admission," "inspection," and "parole," and whether Cubans entering through irregular means could be paroled and eventually adjust under the CAA.⁷⁸ The INS determined that Cubans who arrived at a port other than a designated port of entry could no longer adjust to permanent resident status under the CAA.⁷⁹ Immigration advocates considered that the INS interpretation of IIRIRA resulted in *de facto* repeal of the Cuban Adjustment Act.⁸⁰ Community activists feared that if Cubans could not adjust their status and were "deported," this would create a subclass of undocumented aliens who would be unable to earn a living and would linger indefinitely in immigration limbo.⁸¹

This confusion led INS Commissioner Dorris Meissner to issue a memorandum clarifying the legibility for permanent residence under the Cuban adjustment act.⁸² The memorandum specifically addressed the issue of Cubans arriving by sea. In its relevant parts it reads:

This policy clarification, effective immediately, helps define in specific terms those Cubans who are eligible for parole and adjustment of status under the Cuban Adjustment Act, regardless of how they arrived in the United States. Under the CAA, a Cuban national who is paroled may, one year after the grant of parole, apply for permanent residence in the United States. The fact that a Cuban national arrived in the United States at a place other than a designated port of entry will not make him or her

77. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

78. "Irregular means" refers those aliens who enter by sea without going through a port of entry. Cuban rafters who entered without being found did not enter through a "port of entry" a port of entry includes airports, seaports and land ports located at the border.

79. Cuban Refugee Adjustment Act of 1966, *supra* note 4.

80. Dominguez, *supra* note 7.

81. Although immigration could remove a Cuban national under I.N.A § 235, the government of Cuba generally does not accept the repatriation of Cubans from U.S. soil. *See* Cuban Refugee Adjustment Act of 1966, *supra* note 4.

82. Press Release, U.S. Department. of Justice, Clarification of Eligibility for Permanent Residence Under the Cuban Adjustment Act (April 26, 1999) *available at* <http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/cubarel.htm> (last visited Feb. 3, 2002).

ineligible for permanent residence under the CAA (unless the individual is ineligible on other grounds such as having a criminal record). This action removes a significant bar if the Cubans are otherwise eligible for adjustment under the CAA. A Cuban national who is in the United States without having been admitted or paroled by the INS must first surrender into INS custody and receive a grant of parole and wait one year before applying for permanent residence under the CAA. With the grant of parole, the Cuban national will be able to apply for employment authorization.⁸³

Doris Meissner's memorandum and clarification led immigration advocates to declare that the CAA had "survive another blow."⁸⁴ Before the dust settled, the INS threw another roadblock to the implementation of Cuban Adjustment Act. It began to classify Cubans arriving at United States airports "arriving aliens."

Traditionally Cubans arriving through United States airports were placed in exclusion proceedings and the INS adjusted their status even after receiving final exclusion orders.⁸⁵ Subsequent to the passage of IIRIRA, the Immigration and Naturalization Service (INS) took the position that immigration judges lacked the authority to adjudicate the application for adjustment filed by arriving aliens⁸⁶ in removal proceedings. Attorneys for Cubans migrants argued that Cubans cannot be "arriving aliens" under the INA.⁸⁷

They argued that by statutory definition an "applicant for admission" is an alien present in the United States who has not been admitted or who has arrived in the United States.⁸⁸ They further argued that applicants for admission are subject to inspection and screening by INS, and officers

83. *Id.*

84. Dominguez, *supra* note 7.

85. Exclusion orders were given pursuant to 8 U.S.C. § 1182(a)(20) (2001) of the Immigration and Nationality Act.

86. 8 C.F.R. § 1.1(q) (2002). The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port of entry, or an alien seeking transit through the United States at a port of entry, or an alien interdicted in international waters or United States waters and brought into the United States by any means, whether or not to designated port of entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the act.

87. Brief for Appellee/Respondent Artigas, at 9, in *In re Artigas*, (U.S. Dep't of Justice Board of Immigration Appeals) (Case No. A 76 543 602).

88. *Id.* at 10, 8 U.S.C.A. § 1225(a)(1) (West 2001).

shall order the applicant removed unless the alien is a native or citizen of Cuba and said Cuban arrives by aircraft at a port of entry.⁸⁹

Respondents' attorneys argued that because all applicants for admission except for Cubans who arrive by aircraft at a port of entry, if not admissible, must be "expeditiously" removed and Cubans cannot be removed expeditiously, Cubans cannot fall under the INA's definition of arriving alien.⁹⁰

The issue of whether an immigration judge has jurisdiction to adjudicate an application for adjustment of status under the Cuban adjustment act when the applicant is an arriving alien in removal proceedings was decided by the Board of Immigration Appeals (BIA) in *In re Ada Rosa Artigas*.⁹¹ In *Artigas*, the court held that an immigration judge has jurisdiction to adjudicate an application for adjustment of status under the Cuban refugee Adjustment Act of 1966.⁹²

In the 35 years since the passage of the Cuban Adjustment Act, the law has withstood a series of legal challenges. Pro-immigration advocates wonder why there is such a resistance to an act that benefits people a repressive dictatorship.⁹³ The answer appears to point to the political and ideological battles which have plagued the CAA since its inception.

VI. THE POLITICAL BATTLE OVER THE STATUTE

A. *The Cuban Government's Effort to Repeal the "Killer Law"*

If there was ever any doubt as to Cuba's position regarding the Cuban Adjustment act it was dispelled by Cuban president Fidel Castro's speech on March 8, 2000. Castro's key remarks included:

The United States does not have any right to promote the death of people from this country, whether they are criminals or not. The diabolical killing machine that claims lives and provokes tragedies is nothing other than the Cuban Adjustment Act. We will fight against this vicious law, this heinous and criminal law. We will keep fighting until it is repealed. Only then can we be certain that thousands of innocent children will not be illegally uprooted from their homeland, from their schools, from

89. Brief for Appellee/Respondent Artigas, *supra* note 87, at 9; 8 C.F.R. § 235.3(b)(1)(i) (2001).

90. Brief for Appellee/Respondent Artigas, *supra* note 87, at 9.

91. *In re Ada Rosa Artigas*, 23 I. & N. Dec. 99 (BIA 2001).

92. *Id.*

93. Dominguez, *supra* note 7.

their identities, and subjected to extreme dangers or even death.⁹⁴

On July 2, 2000 Ricardo Alarcon continued the verbal assault of the CAA in a television interview with Sam Donaldson.⁹⁵ When asked by Mr. Donaldson⁹⁶ why he referred to the Cuban Adjustment Act as a “killing machine”, Mr. Alarcon responded that the Cuban Adjustment act is a way to “distort reality” and that since the United States is not prepared to have a “Dominican, Mexican, Haitian or a Chinese adjustment act and it’s just for Cuba. It’s precisely Cold war politics.”⁹⁷

Cuba’s public repudiation of the CAA intensified when on July 12, 2000, the government of Cuba issued the “Proclamation by National Assembly of the People’s power of the Republic of Cuba on the Cuban Adjustment Act.”⁹⁸ The proclamation referred to the CAA as “the criminal, immoral and discriminatory immigration policy, deliberately conceived to destabilize and undermine Cuban society while shamefully manipulating the tragedies caused by this act.”⁹⁹ The Cuban government accused the United States of using the CAA to criminally incite Cubans to risk their lives in dangerous sea crossing for the sole purpose of embarrassing the Cuban government.¹⁰⁰ The proclamation called for the United States to “put an end to its criminal, irresponsible and demagogic policy, conceived and implemented against the Cubans, which is detrimental to other Latin Americans and harmful to the interests of the American people.”¹⁰¹

B. Opposition within the United States

The Cuban Adjustment Act has come under fire not only from the government of Cuba, but from political groups within the United States. The question has been asked: Why is it that United States Law reflects

94. Castro Ruz, *supra* note 6.

95. Mr. Alarcon is the president of the National Assembly of the People’s Power of the Republic of Cuba.

96. Sam Donaldson is a U.S television reporter host of the program “This Week.”

97. Interview by Sam Donaldson with Ricardo Alarcon, President of the Cuban National Assembly, This Week, ABC News (Jul. 2, 2000).

98. *Proclamation by the National Assembly of People’s Power of the Republic of Cuba on the Cuban Adjustment Act*, Digital Granma International, Jul. 12, 2000, at <http://www.granma.cu/documento/ingles00/026-i.html> (last visited Feb. 3, 2002).

99. *Id.*

100. *Id.*

101. *Id.*

favoritism for Cubans?¹⁰² The Federation for American Immigration Reform (FAIR) contends that the CAA provides disparate treatment under immigration law between Cuban and other groups.¹⁰³ FAIR has called the CAA “the most massively used exceptional provision in our law” and has publicly called for its repeal.¹⁰⁴

In 1996 Congress debated the repeal of the Cuban Adjustment Act.¹⁰⁵ Senator Bob Graham sought to condition the repeal of the CAA on a democratically elected government being in power in Cuba.¹⁰⁶ Those favoring the Graham amendment argued that repeal of the Act was entirely unjustified because Castro continues to be a brutal dictator who “suppresses all democratic and individual freedoms, and thousands of Cubans still risk their lives by trying to escape to America.”¹⁰⁷

Those opposing the amendment contended that the CAA is an anachronism.¹⁰⁸ While they agreed that Castro is “a ruthless communist dictator” they noted that China, North Korea, and Vietnam are also ruled by ruthless communist dictators and the United States does not give special treatment to those fleeing from those nations.¹⁰⁹ Those opposing the Graham amendment synthesized the belief of those who oppose the CAA when they stated in part:

It would be nice if the United States were able to afford to take in all the billions of people around the world who live under totalitarian rule, but it obviously cannot. We already have millions of people from around the world who have been cleared for legal entry into the United States, many of whom are the spouses or very young children of citizens, but will have to wait for years before their turn to enter comes up. Given this fact, we cannot support a continuation of the Cuba Adjustment Act before its application to the 20,000 parolees who will be let in

102. *Issue Brief, Favoritism for Cubans*, FEDERATION FOR AMER. IMMIG. REFORM, Jul. 1998, available at <http://www.fairus.org/html/04154806.htm> [hereinafter FAIR Brief].

103. FAIR argues that Haitians who arrive under similar circumstances as Cubans do not receive the same treatment under that law. See FAIR Brief, *supra* note 102.

104. FAIR Brief, *supra* note 102, at 4.

105. 104th CONG. REC. S-4397 (daily ed. Apr. 30, 1996) (Graham amendment No. 3760 to the Dole [for Simpson] amendment No. 3743) available at <http://www.senate.gov/~rpc/rva/1042/104291.htm>.

106. *Id.* at 2.

107. *Id.*

108. *Id.* at 3.

109. *Id.*

each year. Therefore we urge the rejection of the Graham Amendment.¹¹⁰

The Graham amendment passed 62 to 37, and the repeal of the Cuban Adjustment Act was averted.¹¹¹

The attacks on the Cubans Adjustment Act have gone beyond the legal and the political arena and have entered the realm of legal academia. Some in academia have argued that the social ills that are caused by the CAA are “too great for the CAA’s roots to remain unexamined.”¹¹² The authors of the Harvard note have put forth the notion that the justifications which created the CAA are outdated and that the CAA has inflicted “great harm on American Society.”¹¹³ They argue that the CAA has been accused of being a racist policy, which in turn has tarnished the legitimacy of United States immigration policy, fostering social apathy, dissatisfaction and resentment in immigrant communities.¹¹⁴

Furthermore, critics argue that in addition to fostering internal discontent the CAA has benefited Castro because the it “has been simultaneously a sword that cuts deep lines of division and resentment in the United States and shields and protects the island by enabling him to export undesirables and unify all Cubans.”¹¹⁵

VII. CONCLUSION

The Cuban Adjustment Act is the byproduct of an era when United States Immigration Policy was a testament of the ideals and values of the United States. In 1966, The United States government thought that the ideal of protecting those fleeing communism in the island of Cuba was worthy of special legislation. The legislative history suggests, and the statutory language indicates, that the intent and purpose of the Cuban Adjustment Act is to facilitate the integration of those fleeing Cuba into American society by granting them the right to become permanent United States residents. Congress has ratified its intent in subsequent years and the courts have validated the legality of the statute by upholding the right of Cubans in the United States to adjust their status using the CAA.

110. 104th CONG. REC. S-4397 (daily ed. Apr. 30, 1996) (Graham amendment No. 3760 to the Dole [for Simpson] amendment No. 3743) available at <http://www.senate.gov/~rpc/rva/1042/104291.htm> (last visited Feb. 2, 2002).

111. *Id.* at 4.

112. *The Cuban Adjustment Act of 1966: ?Mirando Por los Ojos de Don Quijote O Sancho Panza?*, *supra* note 16, at 904.

113. *Id.* at 914.

114. *Id.* at 916.

115. *Id.* at 917.

Those who oppose the CAA argue that its initial purpose is no longer valid, and that it gives Cubans an unfair advantage. However, Cubans continue to flee Cuba, and the Cuban government continues to violate human rights and other immigrant groups do not benefit by the repeal of the Cuban Adjustment Act.

Academics have wondered whether Americans will see the CAA through an idealistic lens or a realistic one.¹¹⁶ Human rights activists have asked why there is such resistance to an act that benefits victims of oppression. The CAA has been perpetually interwoven with politics and foreign policy and it will continue to be so. The CAA might be the law of the land, but it has been, and continues to be, a law under siege.

116. *Id.* at 924.